Supreme Court, U.S.
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In The

Supreme Court of the United States

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WOODSON R. HART,

Petitioner,

v.

KENNETH B. HODGES, III, WILLIAM AMIDEO,
and FREDERICK HEAD,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the important federal issue of the doctrine of absolute prosecutorial immunity and the increasingly recurrent problem of prosecutors who imprison individuals in disregard of judicial orders.

Here, a Georgia sentencing court clarified a previous state sentence and ordered that Petitioner was not to serve any period of state incarceration after his release from a federal prison in Arkansas. Nevertheless, Respondent persuaded law enforcement officers of Arkansas to seize and detain Petitioner after his release from the federal facility. Respondent also conspired with the general counsel of Georgia's corrections department to force Petitioner to submit to imprisonment in Georgia through the issuance of a "state warrant" and a notice to surrender that threatened revocation of probation and charges for "escape."

The questions presented are:

1. Whether a state prosecutor is entitled to absolute prosecutorial immunity for his act of persuading law enforcement officers in another state to seize and detain a person in contravention of a judicial order prohibiting such detention.

2. Whether a prosecutor is entitled to absolute prosecutorial immunity for conspiring with a state corrections official to force an individual to submit to seizure and state incarceration in contravention of a judicial order prohibiting any state incarceration.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below:

The Petitioner here and the sole Appellant below in the United States Court of Appeals for the Eleventh Circuit is Woodson R. Hart.

The primary respondent here and an Appellee below in the United States Court of Appeals for the Eleventh Circuit is Kenneth B. Hodges, III (hereinafter "Respondent"). Other Appellees below, who are parties to this proceeding but are less directly related to the issues raised, are William F. Amideo and Frederick Head. (The latter two respondents will be referred to hereinafter by name.)

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Mr. Woodson Hart respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit regarding an award of absolute immunity to Respondent Hodges, who engaged in the increasingly recurrent prosecutorial act of imprisoning individuals in disobedience to and circumvention of judicial orders.

◆

OPINION BELOW

The opinion of the court of appeals (App. 1-App. 26) is reported at 587 F.3d 1288 (11th Cir. 2009). The opinion of the district court (App. 27-App. 44) is not reported.

◆

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2009. Petitioner's Petition for Rehearing was denied on January 8, 2010. (App. 46-App. 47). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section One of the Fourteenth Amendment of the United States Constitution states, in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (the Ku Klux Klan Act of 1871) states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's

> judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .

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STATEMENT OF THE CASE

Petitioner Hart filed this action in the U.S. District Court for the Middle District of Georgia against Respondent Hodges and other Georgia state officials for violating his constitutional rights by causing him to be seized and incarcerated in state facilities located in two states after his release from federal incarceration despite their knowledge of judicial orders prohibiting such state incarceration. Respondent Hodges is the former District Attorney of Georgia's Dougherty County. The two Defendants who are not Respondents here are: (1) William Amideo, the general counsel of the Georgia Department of Corrections ("GDOC"); and (2) Frederick Head, the former warden of Georgia's Jackson State Prison. Petitioner initially asserted claims against two other defendants, the GDOC Commissioner and a "John Doe" employee of the Georgia Department of Law. However, he subsequently waived the claims against those two latter defendants prior to the district court's decision.

I. Factual Statement

A. Background Facts

In 2001, Petitioner Hart negotiated with state and federal prosecutors in hope of avoiding imprisonment in a Georgia prison that could contain inmates whom he had arrested in his former employment as Assistant Chief of Police in Georgia's Dougherty County. All parties agreed that he would enter pleas to serve concurrent, 18 to 24 month state and Federal sentences in a federal prison.[1] The circuit court sentenced him under Federal Sentencing Guidelines to serve 27 months rather than the bargained-for 18 to 24 months.

Petitioner believed that his plea agreement with the state included an understanding that he would not actually be required to serve any term of imprisonment in a state facility. Following Respondent's presentation of Petitioner's agreement to enter an *Alford* plea during the state sentencing, Petitioner's attorney sought to clarify the matter:

> [Petitioner's Attorney]: Your Honor, I . . . I . . . Everything Mr. Hodges said of course, is true. The only thing I would like to add to that is that, as the plea agreement points

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[1] Hart pled guilty on the federal charges of false declaration, wire fraud and engaging in monetary transactions derived from allegedly declining to investigate a blackmail scheme in another county. He was indicted on eight state felony charges arising out of the same event.

> out, the sentence to be handed down by Your Honor is to run concurrent with the Federal sentence, so that actually he's getting no more time to serve that [sic] what he's already serving in the Federal institution.
>
> The Court: Okay.
>
> [Respondent]: I though [sic] I'd said that, but that's correct.
>
> [Petitioner's Attorney]: You may have. If so, I . . .
>
> [Respondent]: That is correct.

The state sentencing court ordered that Petitioner serve a 27 month state sentence identical to the federal sentence and ordered that the state sentence would run concurrently with the federal sentence. Petitioner began serving these matching, concurrent sentences at the Federal Correctional Facility in Forrest City, Arkansas ("the federal facility"). Subsequently, the GDOC issued a document entitled "State Warrant" (hereinafter the "First State Warrant") to the federal facility, with a request that it be placed as a "detainer" upon Petitioner. Upon learning that he might qualify for early federal release after 24 months, Petitioner moved the state sentencing court to clarify whether he would be required to serve any state imprisonment following any potential "early" federal release.

B. Sentence Clarification Order

At a hearing attended by Respondent, the original state sentencing judge found that he had not intended that Petitioner serve any time in a state facility after his release from the federal facility. Thus, on February 20, 2003 that court issued an order clarifying its earlier sentence (hereinafter "the Sentence Clarification Order"). (App. 48-App. 49). That order stated:

> IT IS ORDERED that the detainer that was placed against Woodson R. Hart by the State of Georgia be removed.
>
> IT IS FURTHER ORDERED that Woodson Hart will serve no additional time in any state correctional facility once he is released March 14, 2003 from the federal facility where he is currently staying.

(App. 48).

The GDOC initially dismissed the detainer as ordered. Subsequently, Respondent appealed the Sentence Clarification Order. Petitioner does not assert that Respondent is liable for filing the appeal or any court-related act that he committed during the appeal. Petitioner asserts only that Respondent is liable for the extrajudicial acts that he committed outside the judicial process.

C. Respondent's Defiance of the Sentence Clarification Order.

Petitioner alleges that Respondent contacted the GDOC General Counsel, Defendant Amideo, and they entered into a conspiracy to force Petitioner to be imprisoned in a state facility in circumvention of the February 20th Sentence Clarification Order. Amideo issued a newly-dated copy of the GDOC "state warrant" that had previously been placed as a "detainer" upon Petitioner. This warrant ("the Second State Warrant") was issued on the same day that Respondent filed the notice of appeal. (App. 52). Although this "warrant" bears the purported signature of the GDOC Commissioner, the Answer asserts that he had nothing to do with its issuance. This "warrant" directed Arkansas law enforcement officers to "re-take" Petitioner. It identified the original 27 month state sentence as its authority, but ignored the Sentence Clarification Order that Petitioner was to "serve no additional time in any state correctional facility."

The federal facility refused to honor the Second State Warrant. Undaunted by this federal rebuff, Respondent contacted the Sheriff's Department of Cross County, Arkansas and persuaded that office to dispatch an officer to seize Petitioner upon his release from the federal facility and hold him until he could be transferred to a Georgia prison.

Friday March 14, 2003: After being released from the federal facility, Petitioner was seized by a Cross

County deputy, shackled and transported to the county jail in Wynne, Arkansas.[2] Later that same day, GDOC General Counsel, Amideo, faxed the Second State Warrant to the Wynne County Sheriff's Department along with a letter asking that Petitioner be detained until arrangements could be made to transport him to Georgia. The letter requested that, if Petitioner could not be detained, he be served with the Second State Warrant and an attached "notice to surrender." That notice, signed by Amideo, instructed Petitioner to surrender himself for incarceration at Jackson State Prison in Georgia by 8:00 a.m. on the following Monday. (App. 50-App. 51). The notice threatened that failure to surrender could result in revocation of probation and a new charge of "escape." (App. 50-App. 51). Sheriff's officers served Petitioner with those documents, but – after learning of the Sentence Clarification Order – released Petitioner after he had been detained in their jail for approximately eight and one-half hours.

Meanwhile in Georgia, Respondent issued statements regarding Petitioner to a reporter with the *Albany Herald* newspaper. The following day, Saturday, March 15, 2003, the *Albany Herald* printed an article containing Respondent's statements. "'If he does (report) he will serve out the balance of his prison term. If he does not, he will have new legal issues to deal with,' said [Respondent] Hodges." Respondent had apparently informed the reporter that he had been "working in cooperation with the Georgia DOC." Echoing his GDOC co-conspirator, Amideo, he also asserted that Petitioner could be charged with "escape" if he did not report to the Georgia prison at 8:00 a.m. on the following Monday.

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[2] The court of appeals' decision states that the county jail is in the same county as the federal prison. However, the federal prison is in St. Francis County rather than adjacent Cross County.

Monday, March 17, 2003: Petitioner surrendered at Jackson State Prison at 8:00 a.m. because he feared the threats of probation revocation and potential new charges of "escape" contained in the "notice to surrender" and Respondent's press statement concerning "new issues." However, Petitioner's attorney filed an Extraordinary Motion with the Georgia Court of Appeals.

D. State Court Rulings

1. The Emergency Order

Near the end of that Monday workday, the appellate court issued a scathing order. (App. 53-App. 56). In response to an assertion in Respondent's brief that his act of filing the notice of appeal had acted as a *supersedeas* as a matter of law, the court found the assertion to be "patently erroneous." (App. 55). It found that Respondent had taken his actions in concert with the GDOC "in spite of and in direct opposition to the trial court's clarification order." (App. 55). It further stated:

> The District Attorney simply has no authority to subjugate an order of the Superior Court to his own will, thereby circumventing the orderly imposition of justice.

(App. 55).

The appellate court's order directed that the warden of Jackson State Prison, Defendant Frederick Head, be immediately notified that Petitioner was to be released "*instanter*." (App. 56). The court's chief clerk faxed a copy of the order to the prison at approximately 5:00 p.m. The clerk also telephoned, and informed a prison employee that "*instanter*" means "instantly." Nevertheless, Petitioner was not released until approximately 12:30 p.m. the next day.

2. Final Appellate Opinion and Resentencing.

The Georgia Court of Appeals issued a published decision on Respondent's appeal in August, 2003. (App. 57-App. 61). In response to Respondent's assertion that the sentencing court had lacked jurisdiction to clarify the sentence, the appellate court found that the sentencing court had possessed "inherent power to 'correct or conform an erroneous recording of the court's intended sentence.' " (App. 59-App. 60).

Although the appellate court found that: "the sentence the court intended to impose [in the first sentencing hearing] in March 2001" was void as being for an indeterminate period of time, the court did not void the February 2003 Sentence Clarification Order.

(App. 61). Thus, the sentence was void; the order was not. Indeed, the court expressly affirmed "the portion of the order removing the detainer" and remanded for resentencing for a determinate period of time. (App. 61). On remand, the sentencing court resentenced Petitioner to the "determinate" 24 month period that he had already served in the federal facility.

II. PROCEEDINGS BELOW

A. District Court Proceedings

Petitioner filed this *pro se* action in the U.S. District Court for the Middle District of Georgia alleging claims under 42 U.S.C. § 1983, civil R.I.C.O. and state common law claims. Defendants moved for judgment on the pleadings on numerous grounds including absolute prosecutorial immunity and qualified immunity. Petitioner waived the R.I.C.O. claim before the district court ruled upon the motion.

Petitioner conceded that Respondent is absolutely immune for his judicially-related acts that were "intimately associated with" any judicial phase of his prosecution, such as filing the notice of appeal, representing the state in the appellate proceedings during that appeal and representing the state in the subsequent judicial re-sentencing hearings. However, Petitioner asserted that Respondent is not absolutely immune from claims based upon four[3] acts that Petitioner contends are "extrajudicial."[4]

The alleged extrajudicial acts are:

1. Persuading Arkansas law enforcement officers to seize and detain Petitioner after his release from federal prison in contravention of the Sentence Clarification Order;

2. Conspiring with GDOC General Counsel Amideo to issue the Second State Warrant in contravention of the Sentence Clarification Order;

3. Conspiring with General Counsel Amideo to create and serve Petitioner with the "notice to surrender" demanding Petitioner to surrender for imprisonment in Georgia and threatening Petitioner with probation revocation and an additional charge of escape if he failed to surrender; and

4. Acting to further the conspiracy with General Counsel Amideo to force Hart to surrender for imprisonment in Georgia by repeating the threats contained in the "notice to surrender" while conducting the press conference.

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[3] Hart had alleged that Respondent might also be liable if the facts show that he conspired with Warden Head in failing to release Hart *instanter* as order by the Appellate Court. Hart does not raise that contention here.

[4] "Extrajudicial" as used by Petitioner means: "*adj.* Outside court; outside the functioning of the court system." *Black's Law Dictionary, Second Pocket Ed., 1996 West Publishing Co., ed. Gardner, Bryan A.*

The district court dismissed Petitioner's 42 U.S.C. § 1983 claims solely by holding that Respondent is entitled to absolute prosecutorial immunity for all of his acts, and that the two GDOC officials were also entitled to prosecutorial immunity derived from Respondent's immunity. (App. 42-App. 43). Therefore, the district court granted Respondent's motion for judgment on the pleadings on all federal claims and dismissed Petitioner's state claims without prejudice. (App. 43). The district court did not address the issue of qualified immunity. Petitioner appealed.

B. Eleventh Circuit Court Proceedings

A panel of the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court decision, in part, and reversed, in part, without granting oral argument. (App. 2). It reversed by holding that GDOC General Counsel Amideo and Warden Head are not entitled to absolute immunity for any of their alleged acts. (App. 24-App. 25). The court also reversed by holding that Respondent is not absolutely immune for his statements to the press. (App. 18-App. 20). Based upon this reversal, the appellate court ordered remand and reinstatement of Petitioner's state law claims. (App. 26). However, the court affirmed, in part, by holding that Respondent is entitled to absolute prosecutorial immunity for the three acts of: (1) persuading Arkansas law enforcement officers to seize and detain Petitioner; (2) conspiring in General Counsel Amideo's issuance of the state warrant; and

(3) conspiring in Amideo's acts of creating the notice to surrender and causing it to be served on Petitioner.

Although Petitioner had raised the issue, the Eleventh Circuit did not address whether Respondent had acted outside the scope of his authority. Furthermore, the court did not examine these three acts individually to determine the intimacy of their relationship to the judicial process. Instead, the court determined that:

> . . . All of [Respondent] Hodges' actions were directly related to and intimately associated with the state trial court's sentence and his role as an advocate regarding the court's sentence. Hodges was working to advocate the judicial sentence he understood (whether correctly mistakenly) had been imposed by the state trail court. . . .

(App. 20).

Petitioner asserts that none of these three acts were "advocative," but that all three acts were administrative functions – at best. Indeed, the two conspiratorial acts of issuing the Second State Warrant and notice to surrender were not functions of a prosecutor at all. They were functions of an attorney employed by a state agency. Respondent's actions may have been "directly related" to the state court's sentence, but only insofar as he sought to circumvent the Sentence Clarification Order through those actions. Although Respondent had filed an appeal, the appeal would not be resolved until well after the remaining three months of the original sentence would have been served, as was noted by the Georgia Court of Appeals.[5] (App. 55). Respondent was acting as an advocate only insofar as he filed the appeal and represented the State of Georgia during that appeal and the subsequent resentencing hearing. Respondent's acts of persuading law enforcement to seize and detain Petitioner and conspiring with the GDOC's general counsel to have the latter serve Petitioner with a warrant and a notice to surrender were not the acts of an advocate and were not intimately associated with the judicial phase of the criminal process. They were acts committed for the purpose of circumventing the judicial process.

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REASONS FOR GRANTING THE PETITION

I. THIS COURT'S GUIDANCE IS NEEDED TO RESOLVE A SPLIT AMONG THE CIRCUITS AS TO WHETHER PROSECUTORS ARE ENTITLED TO ABSOLUTE IMMUNITY WHEN DISOBEYING JUDICIAL ORDERS.

The circuits are split on whether a prosecutor is entitled to absolute immunity when ignoring, circumventing, or defying a judicial order. Five of the circuits have denied, or would deny, absolute immunity under such circumstances. Three of those circuits deny absolute immunity for such acts by finding them to be administrative rather than advocative functions. In this case, the Eleventh Circuit joined only one other circuit which has rewarded a prosecutor with the shield of absolute immunity when failing to follow a court directive. However, that circuit did not consider whether the act might be an administrative function.

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[5] The Georgia Court of Appeals noted: " . . . in defiance of the trial court's order, the District Attorney has sought to insure that Hart serves three-and-one-half months of additional incarceration by fashioning his own remedies, as it would take the appellate court that long to rule on this appeal."

In the earliest case involving the issue here, the Fourth Circuit held that a prosecutor was not absolutely immune for causing a person to be detained in state custody after an appellate order caused his case to be dismissed. *Allen v. Lowder*, 875 F.2d 82 (4th Cir. 1989). That court noted that this Court had left open the issues of whether a prosecutor was absolutely immune when acting "in the role of an administrator or an investigative officer rather than that of an advocate." *Id.*, at 85, *citing Imbler v. Pachtmann*, 424 U.S. 409, 430-31 (1976). Nevertheless, that court determined that prosecutors are not entitled to absolute immunity in that circuit when engaging in administrative functions. *Id.* It then determined that the prosecutor had been acting in an administrative role rather than an advocacy role when obtaining a "safekeeping order" from a judge who was apparently unaware of the appellate order. *Id.*, at 86.

The Eighth Circuit reached an opposite result when it determined that a prosecutor who failed to timely obey a judicial order to release a suspect or file an information was entitled to absolute immunity where he did not file the information until many days after the order. *Webster v. Gibson*, 913 F.2d 510, 513-14 (8th Cir. 1990). The Eighth Circuit determined that the prosecutor's disregard of a court order did not place him in an "investigatory function." *Id.*, at 514. That, according to the Eighth Circuit at the time, was the only category of functions where a prosecutor could lose the defense of absolute immunity." *Id.*, at 514, *citing Willhelm v. Turner*, 431 F.2d 177, 182-83 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). This decision, based upon pre-*Imbler* precedent, is questionable because one must wonder whether that circuit would rule the same if it considered whether the act was an administrative function. *See generally Anderson v. Larkin*, 327 F.3d 762, 786 (2003) (*citing Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) and *Imbler* for the proposition that: "The question of whether absolute or qualified immunity applies depends on whether the prosecutor's acts were prosecutorial, investigatory or administrative in nature.") Thus, the Eighth Circuit and Fourth Circuit split on the issue before this Court refined the breadth of Imbler's parameters in 1991. *See generally, Burns v. Reed,* 500 U.S. 478 (1991).

In 1994, the Second Circuit chose to follow the Fourth Circuit's denial of immunity to a prosecutor who kept a person in state custody after a court had dismissed all charges against him. *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1151 (2d Cir. 1994) (*citing Allen v. Lowder*, 875 F.2d at 85-86.). That court reasoned that handling a prisoner after the conclusion of criminal charges "is not a prosecutorial task but rather an administrative one." *Id.*

It appears that the Sixth Circuit would also deny absolute immunity to prosecutors who ignore judicial orders. *See White By Swafford v. Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir. 1988) (Stating that it would not have awarded prosecutorial immunity to a prosecutor who failed to act timely in securing a person's release from jail after being ordered by a judge to "work out the details" of the release.) However, no reasoning is provided for this apparent dictum.

The Tenth Circuit has denied absolute immunity to a prosecutor who countermanded a judicial order to provide a transcript for a prisoner's use in a *habeas corpus* proceeding. *Gagan v. Norton*, 35 F.3d 1473, 1476 (10th Cir. 1994), *cert. denied sub nom. Ritz v. Gagan*, 513 U.S. 1183 (1995). Its reasoning is based upon the fact that a *habeas* proceeding is a civil process rather than a criminal process and is not, therefore, related to the judicial phase of the criminal process. *Id.* (The Eleventh Circuit makes no such civil/criminal distinction, and apparently considers itself bound by pre-*Burns*, Fifth Circuit precedent[6] "concluding that a prosecutor had absolute immunity for presentation of evidence at post-sentencing federal habeas corpus proceedings." *See* App. 15 (*citing Bruce v. Wade,* 537 F.2d 850, 852 (5th Cir. 1976))).

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[6] The Eleventh Circuit adopted all Fifth Circuit decisions prior to October 1, 1981 as binding. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

Most recently, the Third Circuit has joined the Fourth and Second Circuits in determining that prosecutors who cause a person to be kept in custody in circumvention of a judicial order are not entitled to absolute immunity because those acts are administrative functions rather than functions of an advocate. *Odd v. Malone*, 538 F.3d 202, 213-14 (3d Cir. 2008). That court stated that:

> We can imagine few circumstances under which we would consider the act of disobeying a court order or directive to be advocative, and we are loath to grant a prosecutor immunity for such disobedience.

Id., at 214.

Here, the Eleventh Circuit has chosen to follow the only circuit that had granted absolute immunity to a prosecutor who disregards judicial orders. (App. 21, *citing Webster,* 913 F.2d at 513-14). Prior to the Eleventh Circuit's decision here, there was a split in the circuits whereby five circuits refused, for various reasons to award absolute immunity to prosecutors who act in circumvention or disregard of judicial orders. Three of the five circuits have denied immunity because they found the act of holding persons in jail in disregard of judicial orders to be an administrative function. The only circuit that had previously granted absolute immunity in such a situation did not consider whether the act was an administrative function.

This Court should grant certiorari to resolve this split among the circuit courts on the important question of whether prosecutors who ignore court orders granting freedom to people who are incarcerated should be entitled to prosecutorial immunity.

II. AN AWARD OF ABSOLUTE IMMUNITY TO A PROSECUTOR FOR EXTRAJUDICIAL ACTS COMMITTED IN CIRCUMVENTION OF A JUDICIAL ORDER IS INCOMPATIBLE WITH *IMBLER'S* PRIMARY PURPOSE OF PROTECTING THE JUDICIAL PROCESS AND THREATENS THE RULE OF LAW.

The Eleventh Circuit rejected Petitioner's argument that conduct violating a judge's order should be presumed to not be entitled to absolute immunity by stating that such an argument "is not consistent with the fundamental purpose of absolute immunity." (App. 21). However, the court did not identify that "fundamental purpose." Absolute immunity is not grounded upon any special "esteem for those who perform these functions . . . but because any lesser degree of immunity could impair the judicial process itself." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Indeed, the policy of protecting the judicial process underlies much of this Court's recognition of absolute prosecutorial immunity in *Imbler*. *See Burns*, 500 U.S. at 492. This Court's recognition of absolute prosecutorial immunity -- a judicially-created exception to 42 U.S.C. § 1983 – was intended to protect the judicial process, not to frustrate it. *Burns*, 500 U.S. at 485.

Thus, it is protection of the judicial process, rather than protection of the prosecutor, that is the primary purpose of prosecutorial immunity. A prosecutor should be granted absolute immunity for engaging in an act that damages the judicial process only in exceptional situations. A judicial order is unquestionably an integral part of the judicial process, and obedience to judicial orders is a foundation of the rule of law. Disobedience to judicial orders by prosecutors erodes judicial effectiveness and control over criminal proceedings. Furthermore, such disobedience undermines public faith in the judicial system and the effectiveness of the rule of law. This Court has traditionally committed itself to upholding the rule of law by requiring that judicial orders be obeyed by all. *United States v. Nixon*, 418 U.S. 683, 708 (1974).

Judicial orders must be obeyed. As this Court has stated: "[R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." *Walker v. Birmingham,* 388 U.S. 307, 321 (1967) (concluding that civil rights protesters cannot disobey judicial orders even where the orders are founded upon unconstitutional statutes.) Not even the nation's President may ignore a judicial order. *Nixon*, 418 U.S. at 708. How then can it be protective of the judicial process to reward a prosecutor with absolute immunity when violating the rule of law which sustains the judicial process?

On these facts, the Georgia Court of Appeals determined that:

> An order of a Superior Court is presumed to be valid and enforceable until it is overruled or vacated by an appellate court or an authorized trial court. The District Attorney has no authority to subjugate an order of the Superior Court to his own will, thereby **circumventing the orderly imposition of justice**. (*emphasis added*)

(App. 55).

Courts should be "loath to grant a prosecutor immunity for . . . disobedience." *Odd*, 538 F.3d at 214. When considering prosecutorial immunity for prosecutors who circumvent "the orderly imposition of justice," courts should closely scrutinize the acts to determine, not only whether they are advocative functions, but also whether they are "intimately associated with the judicial phase of a criminal proceeding" as required by *Imbler.* 424 U.S. at 430. It is not enough that there is "some" relationship; the relationship must be a "close" one. *Burns*, 500 U.S. at 495. This Court has recognized absolute immunity only in "exceptional situations" where public policy makes it "essential." *Butz v. Economou,* 438 U.S. 478, 507 (1978). The fact that an act defies a judicial order should create a presumption against absolute immunity.

Such a presumption against absolute immunity for acts that circumvent judicial orders arises from policy considerations that are as important as those which justified the judicial creation of prosecutorial immunity. Those policy considerations are judicial control over judicial processes and potential erosion of public trust in the judicial system and the rule of law.

No office in this nation stands above the rule of law; not the office of the President (*Nixon*, 418 U.S. at 708), and certainly not the office of a prosecutor. The public must know that the oft-repeated phrase "ours is a nation of laws, not men" is indeed imbedded in the law and the judicial process. Without the rule of law, our system would degenerate into chaos ruled by the whims of those who occupy powerful positions. Thus, it is important to the nation's public that the rule of law prevails except in very limited circumstances where the harm to the judicial process outweighs the harm to the rule of law.

The policy reason that justifies absolute prosecutorial immunity as being protective of the judicial process is concern that harassment from unfounded litigation would deflect a prosecutor from his duties and perhaps shade his decisionmaking to avoid liability. *Imbler*, 424 U.S. at 422-23. This Court created the prosecutorial immunity exception to 42 U.S.C. § 1983 because: (1) suits by resentful defendants could be frequent, *Imbler*, 424 U.S. at 425;

(2) defense of lawsuits would divert prosecutors from their duty of enforcing the criminal law, *id.*; (3) prosecutors would have more difficulty in meeting qualified immunity standards, *Id.*; and (4) potential liability would prevent "the vigorous and fearless performance of a prosecutor's duties." *Id.*, at 427-28.

These concerns are less weighty in the context of a prosecutor who defies judicial orders. First, few criminal defendants can argue that a prosecutor has defied a court order. Thus, there would be no frequency of such actions. Second, the attention of prosecutors would rarely be diverted by lawsuits because there is no "great frequency" of such acts. Third, although prosecutors might have more difficulty in meeting the standards for qualified immunity, this is simply a risk they run when choosing to disobey a judicial order. All attorneys should be wary in defying a judicial order. Fourth, liability would not prevent vigorous and fearless performance of a prosecutorial "duties" because obedience to judicial orders is a duty of a prosecutor. A prosecutor, like any person, should not be fearless when defying a court order.

A presumption against absolute immunity for prosecutors who disobey judicial orders would need to be rebuttable. One of the most important justifications for prosecutorial immunity is that it only applies to actions and functions that are intimately or closely related to the judicial phase. Therefore, the judge is close by and acts as the "crucible" that protects a defendant from a prosecutor's misdeeds.

Thus, prosecutors who ignore, defy, or circumvent a judicial order through an act that is closely associated with the judicial process could rebut any presumption against immunity by showing that they were acting in a close relationship to the court. One example would be disregard of a motion *in limine* by questioning on forbidden topics during trial. This act takes place during an adversarial proceeding under the watchful eyes of the criminal defense attorney and the judge. The judge can take steps to mitigate any damage arising from defiance of an order in his or her presence. Questioning is a function of an advocate that is performed in, or in very close relation to, the adversarial arena of the criminal process. Thus, a prosecutor should be able to rebut the presumption against immunity for disobeying a judicial order by showing that his act was closely related to a judge.

Persuading law enforcement officers to seize and detain a person and conspiring with an employee of a corrections department to issue a "warrant" and "notice to surrender" do not involve a judge. Therefore, Respondent would not qualify to rebut a presumption against absolute immunity for acts that circumvent a judicial order because his acts were all extrajudicial.

This Court should grant certiorari to determine whether the policy reasons that support absolute prosecutorial immunity outweigh the rule of law and, if not, should create a rebuttable presumption against absolute immunity for those who disobey judicial orders.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDING AND REASONING IN *BURNS*.

A prosecutor is entitled to absolute immunity for his acts are performed as part of his functions as an advocate that are "intimately associated with the judicial phase of the criminal process." *Imbler,* 424 U.S. at 430. However, there is a presumption against absolute immunity, and it should not be extended any "'further than its justification would warrant.'" *Burns*, 500 U.S. at 478 (*quoting Harlow v. Fitzgerald,* 457 U.S. 800, 811 (1982)). Although almost any action by a prosecutor could be argued to be related to the judicial process in some manner, this Court requires courts to consider whether the acts are "**closely** associated with the judicial process." (*Emphasis added*). *Burns,* 500 U.S. at 495. Therefore, this Court has declined to extend absolute immunity to the "prosecutorial function of giving advice to police." *Burns,* 500 U.S. at 496.

In *Burns*, the prosecutor was denied absolute immunity for advising police officers that they "'probably had probable cause to arrest. . . .'" *Burns*, 500 U.S. at 482. Here, Petitioner alleged that Respondent "persuaded" Arkansas law enforcement officers to seize Petitioner upon his release from federal prison. There is little significant difference between advising on probable cause and persuading to arrest. "Persuasion to arrest" is analogous to "advising" officers that there is a legal basis for the seizure. Although Petitioner cannot state with absolute certainty that Respondent "advised" the Arkansas officers concerning the legality of Petitioner's seizure and detention,[7] one can reasonably infer that the officers would not have seized Petitioner without some assurance of legality of their actions.

The Eleventh Circuit cited no precedent that had held a prosecutor to be absolutely immune for "persuading" law enforcement officers to seize a person and made no attempt to distinguish *Burns*. Indeed, the opinion does not focus upon *Burns*' holding regarding advice on prosecutorial immunity. Instead, it points to that portion of *Burns* on "providing legal advice to police regarding pre-indictment investigative techniques." (App. 17, *citing Burns*, 500 U.S. at 486). Furthermore, the circuit court twice cited its pre-*Burns* decision in *Marx v. Gumbinner.* 855 F.2d 783 (11th Cir. 1988). (App. 15 and App. 21). Indeed, the circuit court parenthetically summarized the holding of that case as being "prosecutors have absolute immunity for rendering legal advice to police officers concerning the existence of probable cause to arrest." (App. 14). This is an incorrect statement of the law because that holding has been overruled by this Court.

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[7] Discovery was stayed in the District Court pending resolution of the motion for judgment on the pleadings.

The existence of the *Marx* decision was noted by this Court in *Burns*. 500 U.S. at 478, 483, n. 2. However, this Court expressly held in *Burns* that prosecutors are not absolutely immune for the function of giving advice to police regarding the existence of probable cause. 500 U.S. at 496. Therefore, any reliance that the court of appeals may have placed upon *Marx* in reaching its decision is unwarranted because that holding must be considered to have been overruled by *Burns*.

Even if there is some slight distinction between "advising" on the existence of probable cause to arrest and "persuading" to arrest, the logic and reasoning of *Burns* applies with as much force to the latter as to the former because a prosecutor bears the burden of showing that absolute immunity "is justified for the function in question." *Burns*, 500 U.S. at 486. Under the framework of the analysis performed in *Burns*, there is no justification for making a prosecutor immune for "advising" regarding probable cause to seize, but not persuading to seize.

First, there is no common law precedent of awarding immunity to prosecutors when advising police officers. *Burns*, 500 U.S. at 493. Likewise, the Eleventh Circuit has cited no common law precedent for awarding absolute immunity to prosecutors who persuade police officers to seize a person.

Second, the risk of vexatious litigation does not support absolute immunity for giving advice because the proper focus when considering this factor is not mere concern about interference with an official's duties but, more precisely, a concern about interference with conduct that is "closely" associated with the judicial process. *Burns,* 500 U.S. at 494-95. "That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role *in judicial proceedings,* not for every litigation-inducing conduct." *(italics added). Id.* Persuading law enforcement officers to seize and detain a person is not connected with a prosecutor's role in judicial proceedings. This must be even truer where the prosecutor knows that the seizure will violate a judicial order prohibiting state incarceration. Extrajudicial, out-of-court actions such as persuading law enforcement officers are not subjected to the "crucible of the judicial process." *Imbler,* 424 U.S. 440.

As noted in *Burns*, "[I]t is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice." 500 U.S. at 495. So too would it be incongruous to allow a prosecutor to be absolutely immune for persuading police officers to arrest an individual, but to allow police officers only qualified immunity for arresting the individual.

A prosecutor bears the burden of proving that prosecutorial immunity "is justified for the function in question." *Burns,* 500 U.S. at 486. A court cannot view each incident as part of a whole presentation that is the work of an advocate, but should, instead, look at each separate act to determine whether immunity is warranted for that act or function. *Kalina v. Fletcher*, 522 U.S. 118, 130-31 (1997) (Holding that a prosecutor is not absolutely immune when certifying facts in an affidavit that is submitted to a court simultaneously with an application for an arrest warrant even though the prosecutor is immune for the act of submitting the warrant). However, the Eleventh Circuit appears to believe that the mere pendency of a criminal process, in the form of an appeal, triggers absolute immunity for a prosecutor in all his acts, whether in court or out.

The Eleventh Circuit did not provide a separate functional analysis for Respondent's act of persuading the Arkansas officers to seize Petitioner. Instead, the court considered that act and Respondent's conspiratorial role in the other acts as "working to advocate the judicial sentence he understood (whether correctly or mistakenly) had been imposed by the trial court." (App. 20). However, only those "traditional functions of an advocate" are entitled to absolute immunity. *Imbler*, 424 U.S. at 431.

The filing of the appeal was unquestionably an act of an advocate because it was a submission of a document to a court that can only be filed by an advocate for the state. However, any person can persuade law enforcement officers to seize a person.

Therefore, the act of persuading law enforcement officers to seize and detain Petitioner must be viewed separately from the filing of the appeal.

Petitioner does not challenge the circuit court's lengthy reasoning that a prosecutor may be entitled to immunity for post-sentencing acts that are intimately associated with the judicial process. *See* App. 15-16, *citing Bruce v. Wade*, 537 F.2d at 852 (Awarding absolute immunity for participation in a habeas proceeding); *Allen v. Thompson*, 815 F.2d 1433, 1434 (11th Cir. 1987) (Awarding prosecutorial immunity for giving information to the Federal Parole Commission); *Hughes v. Chesser*, 731 F.2d 728, 729 (11th Cir. 1984) (Awarding absolute immunity to a probation officer for submitting a presentence report to a court); *Jones v. Cannon*, 174 F.3d 1271, 1281 (11th Cir. 1997) (Awarding absolute immunity to police officers when testifying at trial or before grand juries); and *Holmes v. Crosby*, 418 F.3d 1256, 1258 (11th Cir. 2005) (Awarding absolute immunity to parole officers for testimony during revocation proceedings.) *See also* App. 19-20, *citing Allen v. Thompson,* 815 F.2d at 1234 (identifying a prosecutors acts before the Parole Commission as a "continuation of the sentencing process"); and *Lucien v. Priener*, 967 F.2d 1166, 1167 (7th Cir. 1992) (Awarding prosecutorial immunity for sending information during an executive clemency proceeding).

The circuit court found that: "While not undertaken literally at the direction of the court, [Hodges's] activities [we]re so intimately associated with the judicial phase of the criminal process as to cloak [him] with absolute immunity from suits for damages." (*brackets in the original*). (App. 20, *quoting Allen v. Thompson,* 815 F.2d at 1434). Thus, the court must have believed that persuading law enforcement officers to seize and detain a person in circumvention of a judicial order is directly analogous to acting before a parole commission. It is obvious that Respondent was not acting "literally at the direction of the court." He was acting in opposition to the court's direction. Furthermore, he was not acting in a judicial or quasi-judicial setting as is the case in all the above-cited examples provided by the circuit court. In each of those cited instances, the official was awarded absolute immunity when directing an act to a judge or quasi-judicial tribunal where a decision was to be rendered by a neutral decisionmaker. Here, Respondent's act was directed to non-judicial, law enforcement officers. Law enforcement officers are not tribunals or neutral decisionmakers.

The only association between Respondent's act of persuading law enforcement officers to seize Petitioner and the filing of the appeal was a temporal association. The temporal association of a prosecutor's acts to a judicial proceeding are an irrelevant consideration in determining their "intimacy" or "closeness" to the judicial phase. In *Buckley v. Fitzsimmons,* this Court considered whether a prosecutor was entitled to absolute immunity for the function of making press statements after a criminal proceeding had been initiated. 509 U.S. 259, 276-79

(1993). This Court first determined that the temporal location of a plaintiff's injury during criminal proceedings is irrelevant to the question of whether a prosecutor is entitled to absolute immunity. *Buckley*, 509 U.S. at 271-72. Thus, it held that the prosecutor was not entitled to prosecutorial immunity for press statements during the pendency of criminal proceedings because such statements are performed by a prosecutor outside his role as an advocate. Thus, an extrajudicial act is not converted into being "intimately" associated with a criminal proceeding merely because a proceeding is pending.

This Court should grant certiorari to clarify that the holding of *Burns* denies prosecutorial immunity to prosecutors who advise, or otherwise persuade, law enforcement officers to seize any person without a judicially-executed warrant.

IV. THE COURTS BELOW FAILED TO ADDRESS THE ISSUE OF WHETHER A PROSECUTOR IS ACTING WITHIN THE SCOPE OF HIS AUTHORITY WHEN ACTING TO CIRCUMVENT A JUDICIAL ORDER AND WHEN ACTING OUTSIDE HIS TERRITORIAL JURISDICTION.

"'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers. . . .'" *Barr v. Matteo*, 360 U.S. 564 (1959) (*quoting Gregoire v. Biddle*, 177 F.2d 579, 581). Petitioner argued below that a prosecutor is acting outside the scope of his authority when subjecting a person to imprisonment through extrajudicial acts taken in contravention of a judicial order. Furthermore, Petitioner argued that Respondent exceeded the scope of his limited jurisdictional authority in Georgia by persuading officers in a separate state to seize and detain Petitioner.

The court of appeals dismissed those arguments and avoided the "scope of authority" issue by relabeling it as a misapprehension of the "functional analysis of prosecutorial immunity." (App. 20). However, Petitioner again asserts that the "scope of immunity" issue, when raised, must be addressed before a "functional analysis can be performed because an official is not entitled to absolute immunity when committing acts that are "manifestly or palpably beyond his authority." *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). All of Respondent's acts were beyond his general authority, and the act of persuading Arkansas law enforcement officers to seize and detain Petitioner exceeded his territorial authority.

First, a prosecutor acts outside his scope of authority when committing extrajudicial acts to circumvent a judicial order. A prosecutor simply has no authority to "override" a judicial order. As was stated by the Georgia Court of Appeals in its emergency order:

> . . . An order of a superior court is presumed to be valid and enforceable until it is overruled or vacated by an appellate court or an

> authorized trial court. The district attorney simply has no authority to subjugate an order of the Superior Court to his own will, thereby circumventing the orderly imposition of justice. . . .

(App. 55).

This decision by the state appellate court determined that Respondent and his co-conspirator, the GDOC general counsel, had no authority under state law to cause Petitioner to be seized and incarcerated in violation of the superior court order. That appellate determination was one of how authority and power in sentencing are distributed among the organs of the state of Georgia. "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937). Therefore, this Court should give great deference to the "no authority" determination by Georgia's appellate court.

In Georgia, judges have the power: "to control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding." O.C.G.A. § 15-1-3(4). Indeed, "Only the superior and appellate courts shall have the power to issue process in the nature of mandamus, prohibition, specific performance, quo warranto, and injunction." Ga. Const. Art. VI, § I, Para. IV. Here, a superior court was exercising these exclusive constitutional powers when it ordered the removal of the first "detainer" and prohibited the state from subjecting

Petitioner to any state incarceration after his release from the federal facility. Respondent and his GDOC-employed co-conspirator usurped those exclusive powers when they caused Petitioner to be seized and imprisoned in violation of the superior court's order.

In 2003, only a judge or other officer authorized by statute could issue an arrest warrant. O.C.G.A. § 17-4-40.[8] Although the *Commissioner* of the Georgia Department of Corrections ("GDOC") obtained the power to issue an "escape warrant"[9] after 2003, he had no such power when the Second State Warrant was issued.[10] No district attorney or general counsel

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[8] O.C.G.A. § 17-4-40(a) Any judge of a superior, city, state, or magistrate court or any municipal officer clothed by law with the powers of a magistrate may issue a warrant for the arrest of any offender against the penal laws, based on probable cause either on the judge's or officer's own knowledge or on the information of others given to the judge or officer under oath. Any retired judge or judge emeritus of a state court may likewise issue arrest warrants if authorized in writing to do so by an active judge of the state court of the county wherein the warrants are to be issued.

[9] In 2007, the Georgia legislature amended O.C.G.A. § 42-2-8 by adding subsection "c" which authorizes the Commissioner to: "to issue a warrant for the arrest of an offender who has escaped from the custody of the department upon probable cause to believe the offender has violated Code Section 16-10-52 relating to escape from lawful confinement."

[10] O.C.G.A. § 42-2-8 (2006) (a) The commissioner shall direct and supervise all the administrative activities of the board and shall attend all meetings of the board. The commissioner shall also make, publish, and furnish to the General Assembly and to the Governor annual reports regarding the work of the board, along with such special reports as he or she

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for the GDOC has any authority to issue a warrant or any document that calls itself a "warrant" as does the Second State Warrant.[11]

No reasonable Georgia official, other than an appellate judge, can argue that he has any authority to defy a judicial decree except in limited circumstances, none of which are present here. In Georgia, one may not flout the law by disregarding a judicial order even if it is voidable. *Hollis v. State,* 234 Ga. App. 269, 270, 505 S.E.2d 837, 838-39 (1998). It is

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may consider helpful in the administration of the penal system or as may be directed by the board. The commissioner shall perform such other duties and functions as are necessary or desirable to carry out the intent of this chapter and which he or she may be directed to perform by the board. (b) The commissioner or the commissioner's designee shall be authorized to make and execute contracts and all other instruments necessary or convenient for the acquisition of professional and personal employment services and for the leasing of real property. Subject to legislative appropriations, the commissioner shall also be authorized to make and execute any contract for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state correctional institution or for any services pertaining to the custody, care, and control of inmates or other functions as are related to the discharge of these responsibilities and to designate any person or organization with whom the commissioner contracts as a law enforcement unit under paragraph (7) of Code Section 35-8-2.

[11] Respondent's Answer denied that the GDOC Commissioner had played no part in the issuance of the Second State Warrant. The Answer also suggests that such "warrants" are signed electronically by GDOC employees because the Answer asserts that such was the case in the issuance of the first state warrant that was lodged as a detainer.

perfectly clear and well-settled that if a court makes an order in a case that is "within its jurisdiction and power, that order must be obeyed, however clearly it may be erroneous. . . ." *Holbrook v. James H. Pritchard Motor Co.,* 27 Ga. App. 480, 109 S.E. 164, 165 (1921). "The decision of the court depends upon its right to decide a case, and never upon the merits of its decision." *Id.*

On these facts, the appellate court found that the sentencing court was exercising its "inherent power" when it issued the decree removing the first "detainer" and prohibiting Hart's incarceration by the state. (App. 59-App. 60). Federal law is not different. Even the executive privilege of the nation's President is not sufficient to resist a court mandate. *United States v. Nixon*, 418 U.S. at 714. In *Nixon,* the Court stated that even Presidential privilege "must be considered in light of our historical commitment to the rule of law." 418 U.S. at 708.

In 1991, the Eleventh Circuit enunciated that orders must be obeyed until set aside except in four limited instances. *In re Novak*, 932 F.2d 1397, 1401-02 (11th Cir. 1991). Those four limited instances are: (1) the ordering court lacks subject matter jurisdiction; (2) no "adequate and effective remedies exist for orderly review of the challenged ruling;" (3) the order requires an irretrievable surrender of constitutional guarantees; or (4) the order is "transparently invalid or patently frivolous." *Id.* at 1401-02. None of those exceptions apply to the order in issue here because: (1) the superior court had "inherent jurisdiction" (*See* App. 59); (2) there was adequate opportunity for remedy through the appeal; (3) there was no threat to Respondent of a loss of a constitutional right; and (4) the order was neither transparently invalid or patently frivolous as shown by the appellate court's affirmation of the removal of the detainer. (App. 61).

In summary, Respondent had no authority to take extrajudicial actions to circumvent a judicial order. Indeed, no such prosecutor has that authority. The question is not whether the act was committed for good or for ill. The question is simply one of authority. To recognize such acts as being within the scope of a prosecutor's authority invites chaos and corrosion of the rule of law.

Second, a Georgia prosecutor has no authority to cause the arrest of a person in another state except through Georgia's extradition process. Respondent would have been acting within the scope of his authority if he had filed an application with the office of the Georgia Governor pursuant to O.C.G.A. § 17-13-1.[12] However, he did not file do so. Instead, he

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[12] O.C.G.A. § 17-13-1(1) states: "(1) The application for a requisition shall be made to the Governor by a district attorney, prosecuting attorney of a state court, judge of a city or state court, or the mayor of any municipal corporation of this state and must show the full name of the fugitive for whom extradition is asked, the crime charged, the state or territory to which he has fled, the full name of the person suggested to act as agent of this state to receive and convey the fugitive to this

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merely persuaded Arkansas officers to seize and detain Petitioner. The Eleventh Circuit recognizes that a prosecutor's absolute immunity is limited to the "territorial jurisdiction of his office." *Elder v. Clarke County, Ga.*, 54 F.3d 694, 695 (11th Cir. 1995), *citing Imbler,* 424 U.S. at 409. Nevertheless, the circuit court did not address this issue below.

This Court should grant certiorari to determine whether a prosecutor is acting within the scope of his authority when circumventing a judicial order through the commission of an extrajudicial act. Furthermore, this Court can determine whether a prosecutor's absolute immunity is limited to the territorial jurisdiction of his office.

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state, the agent in no case to be the prosecutor; but the Governor may, in his discretion, appoint some other suitable person as agent of this state to receive and convey the fugitive. The application must also show that the ends of public justice require that the fugitive shall be brought back to this state for trial and that the requisition is not wanted for the purpose of enforcing the collection of a debt or for any private purpose whatever but solely for the purpose of a criminal prosecution as provided by law; . . . "

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-12257
Non-Argument Calendar

D. C. Docket No. 05-00030-CV-WLS-1

WOODSON R. HART,

Plaintiff-Appellant,

versus

KENNETH B. HODGES, III,
in his individual capacity,
WILLIAM AMIDEO,
in his individual capacity, and
FREDERICK HEAD,
in his individual capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(November 17, 2009)

Before HULL, WILSON and KRAVITCH, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Woodson R. Hart ("Hart"), previously convicted of state and federal charges of bribery and perjury, filed suit against the Defendants-Appellees for allegedly violating his constitutional rights by having him transferred from federal to state custody at the end of his federal sentence. The three Defendants are Kenneth B. Hodges, III, former District Attorney of Dougherty County, Georgia ("Hodges"), William Amideo, the General Counsel of the Georgia Department of Corrections ("Amideo"), and Warden Frederick Head of the Jackson State Prison in Georgia ("Head"). The district court granted the Defendants' motion for judgment on the pleadings on the ground that absolute immunity prevented all civil liability against them. After review, we affirm in part, vacate in part, and remand.

I. FACTUAL BACKGROUND

Hart's 175-paragraph Second Amended Complaint alleges these facts.[1]

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[1] We review a district court's decision on a motion for judgment on the pleadings *de novo*. *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1213 (11th Cir. 2001). On a motion for judgment on the pleadings, we accept all facts alleged in the complaint as true and construe the allegations in the light most favorable to the plaintiff. *Id.*

A. Hart's Plea Agreements

Plaintiff Hart was the Assistant Chief of Police of the Dougherty County, Georgia Police Department. In 2000, in federal court in Georgia, Hart was indicted on three felony charges of false declaration before a grand jury, wire fraud, and engaging in monetary transactions in property derived from a specific unlawful activity, all in connection with an unlawful payment he allegedly received in exchange for declining to investigate a blackmail scheme. Around the same time, Hart also was indicted on eight state felony charges in state court, all arising out of the same events.

Hart entered into plea negotiations with the prosecuting Assistant United States Attorney in the federal case and Defendant Hodges in the state case. Pursuant to plea agreements in both cases, Hart agreed to plead guilty in exchange for a recommendation from the Assistant United States Attorney for a federal sentencing range of 18 to 24 months' imprisonment, followed by supervised release. Hart agreed to plead guilty in exchange for an agreement that his state sentence would be the same as his federal sentence and that the state and federal sentences would run concurrently. On February 27, 2001, the federal district court sentenced Hart to 27 months' imprisonment.

The "State Plea and Sentence Recommendation," signed two days after Hart's federal sentencing, stated that District Attorney Hodges would recommend a total state sentence of 10 years, to be served by a term "in Prison/Jail [of] 27 months," concurrent with the "Federal sentence," followed by a term of probation of 93 months.[2]

On March 1, 2001, Plaintiff Hart appeared at a sentencing hearing in the state case. Defendant Hodges explained the 27-month federal sentence and stated that Hart's agreement with the state called for a sentence of 27 months followed by 93 months of probation, to run concurrent with his federal sentence. Hodges and the state trial court agreed with Hart's attorney's statement that Hart would receive no more time to serve under the state sentence than under the federal sentence:

> [HART'S COUNSEL]: Your Honor, I – I – everything Mr. Hodges said, of course, is true. The only thing I would like to add to that is that, as the plea agreement points out, the sentence to be handed down by Your Honor is to run concurrent with the Federal sentence, so that actually he's getting no

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[2] As to the state sentence, Hart's federal plea agreement also provided: "The District Attorney and Defendant agree to a sentence in the State case of ten years, which term will be composed of: (a) a term of imprisonment in an amount equal to the term of imprisonment imposed by [the district court], which term will run *concurrent* with the term of imprisonment imposed by [the district court], and (b) a term of probation in an amount equal to the remainder of the ten year sentence following the term of imprisonment." (emphasis in original).

more time to serve that [sic] what he's already serving in the Federal institution.

THE COURT: Okay.

MR. HODGES: I though [sic] I'd said that, but that's correct.

[HART'S COUNSEL]: You may have. If so I . . .

MR. HODGES: That is correct.

B. Detainer Lodged Against Hart

On April 16, 2001, Hart began serving his 27-month federal sentence at the Federal Correctional Institution in Forrest City, Arkansas (the "federal prison"). At some point during his federal detention, federal prison officials decided Hart would be released from the federal prison after a term of 24 months, three months earlier than the full 27-month sentence. This meant Hart's federal release would be on March 14, 2003. Defendant Hodges "prevailed upon" the Georgia Department of Corrections (the "Georgia DOC") to issue a State Warrant, dated June 6, 2001 (the "first state warrant"), to be lodged as a detainer against Hart so that he would be detained upon his release from the federal prison.

C. State Court Removes Detainer

In January 2003, Hart filed a motion for a new hearing on his sentencing with the state trial court judge who sentenced Hart originally. Defendant

Hodges appeared at the state court hearing on Hart's sentencing motion. On February 20, 2003, the state trial court ordered (1) that the detainer placed against Hart by the Georgia DOC (through Hodges's actions) be removed; and (2) that: "Hart will serve no additional time in any state correctional facility once he is released March 14, 2003 from the federal facility where he is currently serving" (hereinafter, the "second state sentence").

On March 12, 2003, Defendant Hodges filed a notice of appeal of the state trial court's February 20, 2003 second state sentence.

At the prompting of Defendants Hodges or Amideo, the Georgia DOC issued a second "State Warrant," dated March 12, 2003, instructing federal prison officials and Arkansas state law enforcement officials to "retake [Hart] wherever he may be found for his return to the State Penitentiary of Georgia" (the "second state warrant"). Defendant Hodges also allegedly called the Sheriff's Office of Cross County, Arkansas, where the federal prison is located, and persuaded law enforcement officers there to detain Hart upon his release from federal custody, to transfer him to the Cross County, Arkansas Jail, and to hold him until Hodges could arrange for Hart to be transported to Georgia.

D. Events of March 14-17, 2003

Hart was released from the federal prison at approximately 8:00 a.m. on Friday, March 14, 2003.

An officer from the Cross County, Arkansas Sheriff's Office picked up Hart from the federal prison, detained Hart in shackles, and transported him to the Cross County Jail.

On March 14, 2003, Defendant Amideo faxed a copy of the second state warrant to the Cross County Sheriff's Office and instructed Cross County officials to detain Hart until he could be taken into custody by officers of Dougherty County, Georgia, or, if he could not be detained, that he be served with an enclosed copy of a notice to surrender. The separate notice to surrender, dated March 14, 2003, and also signed by Amideo, ordered Hart to surrender to the Jackson State Prison in Jackson, Georgia (the "Georgia prison") at 8:00 a.m. on Monday, March 17, 2003. It further informed Hart: "Failure to surrender at the above appointed place and time may result in the violation of any existing conditions of probation which you have and/or the commission of a new offense of escape from custody."

At approximately 4:30 p.m. on March 14, 2003, Hart was released from the Cross County Jail because Cross County officials confirmed Hart's assertion that the Georgia trial court's order (albeit under appeal) had ordered Hart released following his federal incarceration. Hart traveled back to Georgia on his own.

E. Hart's Incarceration in the Georgia Prison

On or about March 14, 2003, Defendant Hodges discussed Hart's incarceration with a reporter from the *Albany Herald*. In an article printed on March 15, 2003, Hodges is quoted as saying Hart could be charged with escape if he failed to report to the Georgia prison on Monday, March 17, 2003. Hodges is also quoted in the article as taking the position that his appeal of the Georgia trial court's sentencing order had the effect of nullifying the order and reinstating the detainer against Hart.

Hart surrendered at the Georgia prison at 8:00 a.m. on Monday, March 17, 2003.

F. Expedited Appeal to the Georgia Court of Appeals

On the morning of March 17, 2003, Hart filed an Extraordinary Motion for Expedited Appeal with the Georgia Court of Appeals seeking to secure his release. Defendant Hodges responded the same day, asserting that his previous notice of appeal of the state trial court's sentencing order acted as a supersedeas and suspended the effect of the second state sentence. Hodges also asserted the second state sentence was void.

Before 5:00 p.m. on March 17, 2003, the Georgia Court of Appeals ruled that Hart must be released "instanter" from the Georgia prison. Its order stated:

> [T]he District Attorney is not free to disregard the orders of the Dougherty Superior Court or to seek detainer against Hart. . . .
>
> The District Attorney contends that, by filing a notice of appeal, the trial court's original order clarifying Hart's sentence was immediately rendered null and void. This contention is patently erroneous. . . .
>
> The District Attorney simply has no authority to subjugate an order of the Superior Court to his own will, thereby circumventing the orderly imposition of justice.
>
> . . . .
>
> Given the fact that Hart has completely served his time under the existing order of the trial court, the State has no lawful authority to incarcerate him at this time.

Hart alleges the Chief Clerk of the Georgia Court of Appeals faxed a copy of its order to the Georgia prison at approximately 5:00 p.m. on March 17, 2003 and also telephoned the Georgia prison and explained to an unknown employee that "instanter" in the order meant instantly.

Hart was released from the Georgia prison at approximately 12:25 p.m. on March 18, 2003, after approximately 28.5 hours of incarceration.

On August 28, 2003, the Georgia Court of Appeals issued a full decision on the merits of Defendant Hodges's appeal. *State v. Hart,* 263 Ga. App. 8, 587 S.E.2d 164 (Ga. Ct. App. 2003). The Court of Appeals determined the state trial court's second state sentence – stating that Hart would serve no additional time in a state prison after his federal release – was void because it was for an indeterminate period of time, in violation of Georgia law. *Id.* at 9, 587 S.E.2d at 166. The Court of Appeals vacated that second state sentence and remanded for re-sentencing. *Id.* Because the Georgia DOC's detainer was based on a void sentence, the Georgia Court of Appeals affirmed the portion of the state trial court's sentencing order removing the detainer. *Id.* On October 9, 2003, the state sentencing court held another sentencing hearing and sentenced Hart to time served.

G. District Court Proceedings

Plaintiff Hart filed this action on March 11, 2005. In his Second Amended Complaint, Hart alleges claims against Defendants Hodges, Amideo, and Head, in their individual capacities, for violations of his constitutional rights under the Fourth, Fifth, and Fourteenth Amendments pursuant to 42 U.S.C. § 1983, and for battery and conspiracy under Georgia law.[3]

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[3] Hart originally also sued Georgia DOC Commissioner W. James Wetherington and a John Doe defendant. During the district court proceedings, Hart voluntarily dismissed (1) a civil RICO claim; (2) his official capacity claims against all Defendants; and (3) his claims against Defendants Wetherington and Doe. Hart originally also asserted claims under 42 U.S.C. § 1985 but abandoned these on appeal.

Defendants Hodges, Amideo, and Head moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).[4] The Defendants argued that they were immune from suit because of absolute prosecutorial immunity and, in the event absolute immunity did not apply, that they were entitled to qualified immunity.

On March 30, 2009, the district court granted the Defendants' motion for judgment on the pleadings on the basis that Defendants Hodges, Amideo, and Head were immune from suit through the doctrine of absolute immunity. The federal claims having been dismissed, the district court also dismissed Hart's pendent state law claims without prejudice for lack of jurisdiction. The district court did not address whether the Defendants were entitled to qualified immunity.

Hart filed this timely appeal.

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[4] "Judgment on the pleadings is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998). The party claiming immunity from suit bears the burden of proof. *Weissman v. NASD*, 500 F.3d 1293, 1295-96 (11th Cir. 2007).

II. DISCUSSION

A. The Doctrine of Absolute Prosecutorial Immunity

In *Imbler v. Pachtman,* 424 U.S. 409, 96 S. Ct. 984 (1976), the Supreme Court considered whether traditional common-law immunities for prosecutors, which derived from immunities recognized for judges, applied to civil cases brought under 42 U.S.C. § 1983. The Supreme Court concluded that they did. *Id.* at 427-28, 96 S. Ct. at 993-94 (quoting *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.) ("In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.")). The Supreme Court has explained that the common law gives absolute immunity in § 1983 actions for activities that are "'intimately associated with the judicial phase of the criminal process.'" *Van de Kamp v. Goldstein,* 129 S. Ct. 855, 860 (2009) (quoting *Imbler,* 424 U.S. at 430, 96 S. Ct. at 995); *accord Jones v. Cannon,* 174 F.3d 1271, 1281 (11th Cir. 1999).[5]

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[5] Courts often refer to "prosecutorial" immunity and "absolute" immunity synonymously when discussing acts by prosecutors. To be clear, prosecutorial immunity and "quasi-judicial immunity," which is often used to refer to acts by executive officials other than prosecutors, are both forms of absolute immunity. For the purposes of this opinion, absolute, prosecutorial, and quasi-judicial immunities are used interchangeably.

"[A] functional approach has evolved to determine whether executive branch public officials should be granted absolute immunity for taking particular actions, or whether they should enjoy instead only the qualified immunity normally afforded public officials." *Jones,* 174 F.3d at 1282. This functional approach looks to the nature of the function performed, not to the identity of the person who performed it. *Buckley v. Fitzsimmons,* 509 U.S. 259, 269, 113 S. Ct. 2606, 2613 (1993). Under this functional analysis, executive branch officials are entitled to absolute immunity for certain functions intimately associated with the judicial process. *Van de Kamp,* 129 S. Ct. at 861.

Subsequent Supreme Court decisions established outer bounds on what activities qualify for prosecutorial immunity and to which individuals it applies. Prosecutorial immunity applies, for instance, to the prosecutor's actions in initiating a prosecution and presenting the State's case. *Imbler,* 424 U.S. at 431, 96 S. Ct. at 995. A prosecutor is immune for malicious prosecution. *Malley v. Briggs,* 475 U.S. 335, 342-43, 106 S. Ct. 1092, 1097 (1986).[6] Prosecutors are immune for appearances before a court and conduct in the courtroom, including examining witnesses and presenting evidence in support of a search warrant during a probable cause hearing. *Burns v. Reed,* 500 U.S. 478, 490-92, 111 S. Ct. 1934, 1942 (1991); *Kalina v. Fletcher,* 522 U.S. 118, 126, 118 S. Ct. 502, 507-08 (1997); *see also Van de Kamp,* 129 S. Ct. at 861. Prosecutors are also immune from damages claims alleging failure to institute a system of information-sharing among deputy district attorneys regarding confidential jailhouse informants. *Van de Kamp,* 129 S. Ct. at 863-64 ("The management tasks at issue, insofar as they are relevant, concern how and when to make impeachment information available at trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties.").

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[6] A federal prosecutor defending a *Bivens* action is also immune. *Butz v. Economou,* 438 U.S. 478, 504, 98 S. Ct. 2894, 2909-10 (1978); *Allen v. Thompson,* 815 F.2d 1433, 1434 (11th Cir. 1987).

Applying these principles, our circuit has emphasized that, "[a] prosecutor enjoys absolute immunity from allegations stemming from the prosecutor's function as advocate." *Jones,* 174 F.3d at 1281. Such absolute immunity "extends to a prosecutor's acts undertaken in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." *Id.* (quotation marks omitted); *accord Rowe v. City of Fort Lauderdale,* 279 F.3d 1271, 1279 (11th Cir. 2002). "Although absolutely immune for actions taken as an advocate, the prosecutor has only qualified immunity when performing a function that is not associated with his role as an advocate for the state." *Jones,* 174 F.3d at 1281-82; *accord Rowe,* 279 F.3d at 1279-80 (prosecutor who proferred perjured testimony and fabricated exhibits at trial is entitled to absolute immunity, but a prosecutor who participated in the search of a suspect's apartment is entitled to only qualified immunity). Prosecutors have absolute immunity when "filing an information without investigation, filing charges without jurisdiction, filing a baseless detainer, offering perjured testimony, suppressing exculpatory evidence, refusing to investigate . . . complaints about the prison system, [and] threatening . . . further criminal prosecutions. . . ." *Henzel v. Gerstein,* 608 F.2d 654, 657 (5th Cir. 1979);[7] *accord Marx v. Gumbinner,* 855 F.2d 783, 789 n.10, 790 (11th Cir. 1988) (concluding that prosecutors have absolute immunity for rendering legal advice to police officers concerning the existence of probable cause to arrest).

This immunity may extend to certain post-sentencing conduct of a prosecutor. *Bruce v. Wade,* 537 F.2d 850, 852 (5th Cir. 1976) (concluding that prosecutor had absolute immunity for presentation of evidence at post-sentencing federal habeas corpus proceedings); *Allen,* 815 F.2d at 1434 (concluding that prosecutor had absolute immunity for giving information about a defendant to the Parole Commission in regard to whether to grant parole to the defendant serving a federal sentence). In *Allen v. Thompson,* this Court reasoned that, "[p]arole decisions are the continuation of the sentencing process, and the assistant United States Attorney's reports to the Parole Commission are part of that process." 815 F.2d at 1434. We added: "[w]hile not undertaken literally at the direction of the court, these activities are so intimately associated with the judicial phase of the criminal process as to cloak the prosecutors with absolute immunity from suits for damages." *Id.*

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[7] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

Prosecutorial immunity is not limited solely to prosecutors. Probation officers are entitled to absolute immunity for the preparation and submission of a presentence report in a criminal case because the "report is an integral part of the sentencing process, and in preparing the report the probation officer acts at the direction of the court." *Hughes v. Chesser,* 731 F.2d 1489, 1490 (11th Cir. 1984) (state probation officer) (quoting *Spaulding v. Nielsen,* 599 F.2d 728, 729 (5th Cir. 1979) (federal probation officer)). "[T]his narrow function is intimately associated with the judicial phase of the criminal process[.]" *Hughes,* 731 F.2d at 1490 (internal quotation marks omitted). Police officers receive absolute immunity for their testimony as witnesses at trial and in grand jury proceedings. *Jones,* 174 F.3d at 1281. Individual Parole Board members "are entitled to absolute quasi-judicial immunity from a suit for damages." *Holmes v. Crosby,* 418 F.3d 1256, 1258 (11th Cir. 2005). Parole officers also have absolute quasi-judicial immunity "for testimony given during parole revocation hearings when they act within the scope of their duties." *Id.*

On the other hand, prosecutorial immunity does not apply when the prosecutor acts outside the ambit of activities "intimately associated" with the judicial process. Generally, the Supreme Court has made clear that prosecutorial immunity may not apply when a prosecutor is not acting as an officer of the court but is instead engaged in certain investigative or administrative tasks. *Van de Kamp,* 129 S. Ct. at 861. These activities include conducting investigative work before an arrest, *Buckley,* 509 U.S. at 275-76, 113 S. Ct. at 2617, making statements to the press, *id.* at 277, 113 S. Ct. at 2617-18, and providing legal advice to police regarding pre-indictment investigation techniques. *Burns,* 500 U.S. at 496, 111 S. Ct. at 1944-45. Prosecutorial immunity does not apply when a prosecutor knowingly makes false statements of fact in an affidavit supporting an application for an arrest warrant. *Kalina,* 522 U.S. at 123, 118 S. Ct. at 506. "Likewise, police officers do not have absolute immunity for submitting supporting affidavits in their applications for arrest warrants." *Jones,* 174 F.3d at 1282.

1. Defendant Hodges

Plaintiff Hart argues Defendant Hodges is not immune from suit for the following acts:

(1) conspiring to cause the issuance of the second state warrant;

(2) calling upon law enforcement officers in Arkansas to detain Hart upon his release from the federal prison;

(3) conspiring with Amideo to issue a notice to surrender to Hart and threatening further prosecution; and

(4) issuing statements to the *Albany Herald.*[8]

The district court reasoned that because Hodges was "attempt[ing] to achieve completion of the sentence he thought was ordered by the federal and state court judges[,]" he was entitled to absolute immunity. D. Ct. Order at 12 (Mar. 30, 2009) (citing *Henzel,* 608 F.2d at 657).

As an initial matter, it is clear that Hodges is not absolutely immune for his alleged statements to the press. The Supreme Court's decision in *Buckley v.*

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[8] We recognize that Hart also claims the district court erred in granting Hodges and Amideo absolute immunity for their advice to Warden Head to disregard the order of the Georgia Court of Appeals. However, Hart's Second Amended Complaint does not allege facts sufficient to state such a claim against Hodges and Amideo. The Second Amended Complaint does allege: "Discovery may show that Defendants, D.A. Hodges . . . [and/or] General Counsel Amideo . . . acted in conspiracy with Defendant Warden Head to cause Plaintiff not to be released in a timely manner." Second Am. Compl. ¶ 137. The Second Amended Complaint does not otherwise allege Defendants Hodges or Amideo participated in any way in Warden Head's disregard of the Georgia Court of Appeals's order faxed to the Warden. *See id.* ¶¶ 87-89. These vague allegations of conspiracy to disregard the order of the Court of Appeals are not sufficient to state such a claim. *See Gonzalez v. Reno,* 325 F.3d 1228, 1235 (11th Cir. 2003). Thus, Hart has not shown reversible error in this regard, and we need not address whether Hodges or Amideo would be absolutely immune for such conduct.

Fitzsimmons categorically forecloses absolute prosecutorial immunity for statements to the media. 509 U.S. at 278, 113 S. Ct. at 2618. The district court thus erred in granting absolute prosecutorial immunity to Defendant Hodges for his statements to the *Albany Herald*.

Our consideration of the remaining conduct concerns whether that conduct was "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430, 96 S. Ct. at 995. After review, we agree with the district court that Hodges is entitled to absolute immunity for his alleged actions in (1) causing the Georgia DOC to issue the second state warrant instructing federal and Arkansas officials to retake Hart for his return to the Georgia prison to serve his already-imposed state sentence, (2) arranging to have Hart detained at the federal prison after his release in order to return to Georgia, and (3) conspiring to threaten Hart with further prosecution if he did not return to Georgia.[9] Our previous decisions held prosecutors were absolutely immune for filing a baseless detainer and threatening further criminal prosecution, *Henzel,* 608 F.2d at 657, and for forwarding information about a defendant to the Parole Commission as a "continuation of the sentencing process." *Allen*, 815 F.2d at 1434; *see also Lucien v. Preiner*, 967 F.2d 1166, 1167 (7th Cir. 1992) (state prosecutor entitled to absolute immunity for sending letter during inmate's executive clemency proceedings because, "[a] determination of executive clemency, like a parole decision, is an extension of the sentencing process"). We see no material distinction between those earlier cases granting immunity for certain post-sentencing conduct and this case. All of Hodges's actions were directly related to and intimately associated with the state trial court's sentence and his role as an advocate regarding the court's sentence. Hodges was working to advocate the judicial sentence he understood (whether correctly or mistakenly) had been imposed by the state trial court. "While not undertaken literally at the direction of the court, [Hodges's] activities [we]re so intimately associated with the judicial phase of the criminal process as to cloak [him] with absolute immunity from suits for damages." *Allen*, 815 F.2d at 1434.

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[9] Plaintiff Hart does not argue that Defendant Hodges violated his rights by appealing the state trial court's second sentencing order or through his appearances before the state trial court or the Georgia Court of Appeals. We consistently have held that prosecutorial immunity applies for actions taken as an integral part of a criminal appeal. *Henzel,* 608 F.2d at 657.

Hart's argument on appeal relies heavily on his assertion that a prosecutor should be categorically denied absolute immunity if he disobeys a judge's order (e.g., the second state sentence that Hodges appealed) outside the presence of the judge. This argument, however, misapprehends the functional analysis used in considering absolute immunity. As we repeatedly have stated, the determination of absolute prosecutorial immunity depends on the nature of the function performed, not whether the prosecutor performed that function incorrectly or even with dishonesty, such as presenting perjured testimony in court. *Jones,* 174 F.3d at 1289.

Hart's argument that conduct violating a judge's order, or more broadly, violating a legal obligation, should not be entitled to absolute immunity is not consistent with the fundamental purpose of absolute immunity. Absolute immunity renders certain public officials completely immune from liability, even when their conduct is wrongful or malicious prosecution. Having absolute immunity in civil damages actions would be of little consequence if it could only be asserted when the defendant prosecutor correctly complied with all his legal obligations, in which case there would be no claim.[10] *Marx,* 855 F.2d at 791 (plaintiff's argument that unlawful conduct bars assertion of absolute prosecutorial immunity was "clearly without merit"); *Webster v. Gerstein,* 913 F.2d 510, 513-14 (8th Cir. 1990) (affirming immunity for prosecutor's disregard of a judicial order to file an information or release the defendant).

Rather, the absolute immunity doctrine has evolved such that even wrongful or malicious acts by prosecutors are allowed to go unredressed in order to prevent a flood of claims against the remainder of prosecutors performing their duties properly. *Imbler,* 424 U.S. at 426, 96 S. Ct. at 994.[11] Indeed, as it turns out here, the second state sentencing order, that Hodges allegedly violated through his actions, was later determined to be void under Georgia law, and Hart was remanded for re-sentencing by the state sentencing court. *State v. Hart,* 263 Ga. App. at 9, 587 S.E.2d at 166. Given the gap between the 27-month state sentence originally imposed and the 24 months Hart actually served in federal prison, the state sentencing court imposed yet a third sentence, of time served, that definitively concluded the imprisonment portion of Hart's state sentence.

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[10] The Supreme Court also has noted that "there are other checks on prosecutorial misconduct [instead of individual civil liability for damages], including the criminal law and professional discipline." *Burns,* 500 U.S. at 486, 111 S. Ct. at 1939.

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[11] Hart cites several cases he contends denied absolute immunity because of prosecutors' disobedience of judicial orders. These cases do not stand for the proposition cited and otherwise are not persuasive. For example, in *Odd v. Malone,* 538 F.3d 202, 213-14 (3d Cir. 2008), although the defendant prosecutor violated a judicial order to keep the judge informed of any delays in a related criminal case, it was the conclusion that his conduct "was primarily administrative" that drove the Third Circuit's refusal to extend prosecutorial immunity. In *Gagan v. Norton,* 35 F.3d 1473, 1476 (10th Cir. 1994), the Tenth Circuit denied absolute immunity to a prosecutor who "allegedly countermand[ed] a state court judge's order directing a court reporter to prepare transcripts for use by an indigent pro se litigant in a civil action." The Tenth Circuit denied absolute immunity because "a prosecutor's actions in contravening the authority of the judicial branch of state government *in regard to the defense of a civil action*" were "simply too far removed on the continuum from the core prosecutorial functions of initiating and pursuing *criminal prosecutions* to be covered by absolute immunity." *Id.* (emphasis supplied).

For all of these reasons, we affirm the district court's order granting immunity to Defendant Hodges, except as to his statements to the press.

2. Defendants Amideo and Head

Hart next argues that the district court erred in granting immunity to Defendant Amideo, the general counsel of the Georgia DOC, and Warden Head, who was in charge of the Georgia prison. Hart argues Defendant Amideo cannot be absolutely immune for (1) causing the issuance of the second state warrant, and (2) issuing the notice to surrender to Hart and threatening further prosecution. Hart argues Warden Head is not absolutely immune for ignoring the order of the Georgia Court of Appeals and not releasing Hart for approximately 19.5 hours after receiving notice of the order.

Absolute immunity generally has not been extended to corrections officials. *Procunier v. Navarette,* 434 U.S. 555, 561-62, 98 S. Ct. 855, 859-60 (1978); *Whitehorn v. Harrelson,* 758 F.2d 1416, 1426 (11th Cir. 1985); *Bruce,* 537 F.2d at 852-53. In *Procunier v. Navarette,* the Supreme Court declined to extend absolute immunity in a § 1983 action to the director of a state corrections department, a prison warden and assistant warden, and three subordinate prison employees, holding instead that corrections officials are entitled to civil damage immunity, if at all, through qualified immunity. 434 U.S. at 561-62, 98 S. Ct. at 859-60. We applied *Procunier* in *Whitehorn v.*

Harrelson, when we stated the defendants – employees of the Alabama Department of Corrections – were not entitled to absolute immunity for denying the plaintiff the opportunity to participate in a work release program. 758 F.2d at 1426; *see also Bruce,* 537 F.2d at 852-53 (not applying absolute immunity to custodial officials accused of abusing plaintiff while he was incarcerated).

Defendants Amideo's and Head's actions related to the same subject matter as some of Hodges's conduct – that is, the issuance of the second state warrant, the issuance of the notice to surrender, and disobeying the order of the Georgia Court of Appeals. However, Defendants Amideo's and Head's roles in those matters are materially different from Hodges's role. As a prosecutor, Hodges was directly participating as an advocate for how Hart's sentence should be interpreted. In contrast, Amideo's and Head's roles involved the Georgia DOC's executive function of taking custody of a prisoner. Unlike Hodges, Amideo and Head did not participate in the judicial process, much less have an advocate role in that process. Rather, Defendant Amideo's role as legal advisor to the Georgia DOC, which manages the Georgia prison system, and Warden Head's role as chief jailer of the Georgia prison where Hart was incarcerated, are not roles intimately associated with the judicial phase of the criminal process.

We therefore agree with Hart that the district court erred in granting absolute immunity to Defendants Amideo and Head for actions taken in their roles as state corrections officials and vacate the district court's order as to Amideo and Head.

B. Qualified Immunity

In the district court, the Defendants argued that, even if denied absolute immunity, they still are entitled to qualified immunity. *E.g., Buckley,* 509 U.S. at 278, 113 S. Ct. at 2618; *Burns,* 500 U.S. at 494-95, 111 S. Ct. at 1944 (qualified immunity may be available when officials do not qualify for absolute immunity); *Procunier,* 434 U.S. at 561 n.7, 98 S. Ct. at 859 n.7. The district court did not, however, address the Defendants' qualified immunity arguments. As this issue was raised but not decided in the district court, we think it best to allow the district court to address it in the first instance on remand. *See Strength v. Hubert,* 854 F.2d 421, 426 (11th Cir. 1988) (remanding issue of qualified immunity to the district court for determination).[12]

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[12] The Defendants also argue Plaintiff Hart abandoned any arguments against qualified immunity because he failed to raise the issue in his initial appeal brief, citing our familiar rule that arguments not raised by an appellant are deemed abandoned. *United States v. Curtis,* 380 F.3d 1308, 1310 (11th Cir. 2004). Because the district court did not rule on qualified immunity grounds, however, Hart could not complain of error in the district court's qualified immunity analysis and effectively could not have raised qualified immunity on appeal. In these particular circumstances, Hart did not waive his objections to qualified immunity. And we necessarily take no position on whether the Defendants' alleged actions violated Hart's constitutional

(Continued on following page)

Finally, the district court dismissed Plaintiff Hart's state law claims of battery and conspiracy to commit battery for lack of subject matter jurisdiction because all the federal claims were dismissed. *See* 28 U.S.C. § 1367(c)(3). Having reinstated portions of Hart's federal claims, dismissal of his state law claims for lack of jurisdiction is no longer appropriate. The district court's order dismissing Hart's state law claims is vacated, and the state law claims are reinstated on remand.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

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rights or whether the rights at issue were clearly established at the time of violation. *See Pearson v. Callahan,* 129 S. Ct. 808, 815-16 (2009).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

WOODSON R. HART,
Plaintiff,

vs.

KENNETH B. HODGES, III,
in his individual capacity,
et al.
Defendants.

1:05-CV-30 (WLS)
(Filed Mar. 30, 2009)

ORDER

Presently pending before the Court are Defendants' Motion for Judgment on the Pleadings and Plaintiff's Motion for Leave to Amend. (Docs. 30, 46). For the following reasons, Defendants' Motion for Judgment on the Pleadings (Doc. 30) is **GRANTED** and Plaintiff's Motion for Leave to Amend (Doc. 46) is **DENIED as MOOT**.

BACKGROUND

In Fall 2000, Plaintiff was indicted on three felony charges in this Court, before United States District Judge Duross Fitzpatrick. Plaintiff through his lawyer began to negotiate an agreement to plead guilty to those charges with the Assistant United States Attorney. During the same time period, Plaintiff was also indicted on eight felony charges in the Dougherty County Superior Court, and Plaintiff through his lawyer also began negotiating a plea agreement with Defendant Hodges, then acting as District Attorney for the Dougherty Judicial Circuit. Eventually, Plaintiff reached agreement with each prosecutor, and they reduced these separate agreements to writing. In the Federal agreement, Plaintiff agreed to plead guilty in exchange for a recommendation by the prosecutor for a sentence of 18 to 24 months, to be followed by a period of supervised release. The Federal agreement also included a description of Plaintiff's agreement with the State: Plaintiff would serve a State sentence of 10 years, to be composed of a term of probation and, prior to that, "[a] term of imprisonment in an amount equal to the term of imprisonment imposed by this Court, which term will run **concurrent** with the term of imprisonment imposed by this Court. . . ." (Emphasis in original.)[1] When Plaintiff subsequently entered his guilty plea in this Court, on February 27, 2001, Judge Fitzpatrick sentenced Plaintiff to 27 months imprisonment. The State agreement, which was signed two days after Judge Fitzpatrick imposed that Federal sentence, stated directly that Plaintiff would serve "27 months" in prison or jail, to be followed by probation terms of five or ten years, depending on the charge involved. At the plea session in the Superior

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[1] To clarify, the federal and state agreements were drafted to ensure that Plaintiff would not serve any more time on his state sentence than ordered in the federal sentence.

Court that same day, Plaintiff's lawyer reiterated that "as the plea agreement points out, the sentence to be handed down by Your Honor is to run concurrent with the Federal sentence, so that actually he's getting no more time to serve that [sic] what he's already serving in the Federal institution."

A little over a month after the sentencings, Plaintiff began to serve his prison term at a Federal Correctional Institute in Forrest City, Arkansas. In June, 2001, Defendant Hodges "prevailed upon" the Georgia Department of Corrections (hereinafter, "DOC") to send to FCI Forrest City a detainer requesting that DOC be advised of Plaintiff's release so that it could make arrangements for taking custody of Plaintiff upon his release there. The detainer, entitled a "State Warrant," was signed by Defendant Wetherington, then acting as Commissioner of the DOC. At some point during Plaintiff's Federal imprisonment, Federal prison employees apparently determined that Plaintiff would be released after 24 months, rather than after the full 27 months imposed by this Court. In late January, 2003 – about six weeks before this shortened term would end – Plaintiff's new lawyer filed in the Superior Court a Motion for New Hearing on Sentencing, apparently claiming that Plaintiff's State plea agreement provided that Plaintiff would serve no more prison time than that which he was going to *end up* serving in the Federal system, even if that amount was different from the sentence imposed by Judge

Fitzpatrick. At a hearing, Defendant Hodges disputed Plaintiff's position.

On February 24, 2003, the same Superior Court Judge that had originally sentenced Plaintiff ruled in Plaintiff's favor about the time to be served. The Superior Court Judge also ordered the detainer removed, even though DOC, the issuer of the detainer, had not been made a party to the proceeding. On March 12, 2003, Defendant Hodges filed a notice of appeal, initiating an appeal of the trial judge's order in the Georgia Court of Appeals. Also he contacted Amideo about issuing another detainer for the purpose of incarcerating Plaintiff in a State prison in Georgia. At Defendant Hodges' "prompting," Amideo or Doe or Wetherington, or all of them together, issued a second detainer and dispatched it to FCI Forrest City. Defendant Hodges contacted the local county sheriff's office in Forrest City and asked that office to pick up Plaintiff upon discharge from the Federal facility and to hold him until arrangements could be made to return him to Georgia. On Friday, March 14, 2003, the Arkansas sheriff's office did so, shackling Plaintiff during his transfer to the county jail. Also that day, Defendant Hodges unsuccessfully sought to have the Dougherty County sheriff's office transport Plaintiff back to Georgia. That day too Amideo sent Plaintiff a "notice to surrender," which said that Plaintiff's failure to surrender at Jackson State Prison the following Monday "may result in the violation of any existing conditions of probation which you had and/or the commission of a new offense of escape from custody." And that day Defendant Hodges also informed a reporter for the *Albany Herald* in an interview that Plaintiff could be charged with escape, and this comment was published the next day.

Upon Plaintiff's release from the Arkansas county jail that Friday, he traveled back to Georgia on his own. That weekend his lawyer sought and obtained from the same Superior Court judge, *ex parte*, a $1000 "supersedeas bond" to prevent his incarceration. Nonetheless, Plaintiff surrendered that following Monday morning at Jackson State Prison. During intake he was subjected to a body-cavity search and a head-shaving. Defendant Hodges took no action on that Monday to assist in Plaintiff's release from Jackson, despite his knowledge of the supersedeas bond. That same morning, Plaintiff's lawyer filed an Extraordinary Motion for Expedited Appeal in the Georgia Court of Appeals, seeking to secure Plaintiff's release. The Court of Appeals gave Defendant Hodges until 3:00 p.m. that same day to respond. Defendant Hodges did so, asserting that the notice of appeal acted as a supersedeas, suspending the effect of the second sentencing order, and also asserting that various jurisdictional defects rendered the second sentencing order void. At the end of that day, the Court of Appeals ruled, over Defendant Hodges' written objection, that the State's notice of appeal did not immediately render null and void the trial judge's second sentencing order or the bond order, and that Plaintiff should therefore be freed instanter. The Clerk of the Court of Appeals faxed a copy of the order to Defendant Warden Head late that afternoon, and he telephoned the Prison and told an unknown employee that "instanter" meant "immediately." Plaintiff was not released until the next day, however. When the Court of Appeals in August 2003 issued its decision on the merits, it vacated Plaintiff's sentence. In doing so, it found that the sentence was void. On remand, the trial judge entered a new sentence, but that sentence provided, consistent with the Judge's second sentencing order, that the 24 months Plaintiff already served in the Federal facility was sufficient and no additional months of incarceration would be ordered.

STANDARD OF REVIEW

Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noted facts. *Andrx Pharm. Inc. v. Elan Corp., PLC,* 421 F.3d 1227, 1232-33 (11th Cir. 2005). If upon reviewing the pleadings it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations, the court should dismiss the complaint. *Horsley v. Rivera,* 292 F.3d 695, 700 (11th Cir. 2002).

DISCUSSION

I. DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS (Doc. 30)

Plaintiff's Second Amended Complaint (Doc. 15) includes the following nine counts: Count I is a claim for relief pursuant to 42 U.S.C. §§ 1983 and 1985 against Defendants Hodges, Wetherington, Amideo and Doe for violating Plaintiff's rights under the Fourth and Fourteenth Amendments; Count II is a claim for relief pursuant to 42 U.S.C. §§ 1983 and 1985 against Defendants Hodges, Wetherington, Amideo and Doe for violating Plaintiff's rights under the Fifth and Fourteenth Amendments; Count III is a claim for relief pursuant to 42 U.S.C. §§ 1983 and 1985 against Defendants Hodges, Wetherington, Amideo and Doe for violating Plaintiff's rights under the Fourth and Fourteenth Amendments; Count IV is a claim for relief pursuant to 42 U.S.C. §§ 1983 and 1985 against Defendants Hodges, Wetherington, Amideo and Doe for violating Plaintiff's rights under the Fourth, Fifth and Fourteenth Amendments; Count V is a claim for relief pursuant to 42 U.S.C. §§ 1983 and 1985 against Defendants Hodges, Wetherington, Amideo and Doe for violating Plaintiff's rights under the Fifth and Fourteenth Amendments; Count VI is a claim for relief pursuant to 42 U.S.C. §§ 1983 and 1985 against Defendant Head for violating Plaintiff's rights under the Fifth and Fourteenth Amendments; Count VII is a claim for relief pursuant to 18 U.S.C. §§ 1962 (R.I.C.O.) against Defendants Hodges, Wetherington, Amideo and Doe for R.I.C.O. violations; Count VIII is a Georgia tort claim against Defendants Hodges, Wetherington, Amideo and Doe alleging battery and conspiracy to cause battery; Count IX is a Georgia tort claim against Defendants Hodges, Wetherington, Amideo and Doe alleging battery and conspiracy to cause battery.

Defendants' Motion for Judgment on the Pleadings (Doc. 30) challenges Plaintiff's Second Amended Complaint on several grounds. First, Defendants contend that the Court lacks subject matter jurisdiction to hear Plaintiff's claims. Second, Defendants argue that Plaintiff's Claims against John Doe are improper for various reasons. Third, Defendants argue that they are entitled to absolute immunity from Plaintiff's claims. Fourth, Defendants contend that they are entitled to qualified immunity in the event prosecutorial immunity does not apply in this case. Fifth, Defendants argue that notwithstanding the other arguments against the survival of Plaintiff's action, certain of Plaintiff's claim clearly fail to state a claim to relief cognizable under the law. As will be addressed by the Court, Plaintiff has waived certain claims.

A. Plaintiff's Waiver of Certain Claims

Plaintiff notifies the Court of his intent to waive 1) "all claims related to RICO[, 18 U.S.C. § 1962]," 2) all claims against Defendants in their official capacities, 3) all claims against Defendant

Wetherington, and 3) all claims against Defendant Doe. Accordingly, Defendants' Motion for Judgment on the Pleadings (Doc. 30) is **GRANTED** as it relates to any of the claims waived by Plaintiff.

B. Subject Matter Jurisdiction

The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." U.S. Const. Amend. XI. "Though by its plain terms the Eleventh Amendment only precludes federal courts from entertaining suits against a state brought by citizens of another state, it has been construed to bar suits against a state brought by that state's own citizens as well." *McClendon v. Georgia Dept. of Community Health,* 261 F.3d 1252, 1256 (11th Cir. 2001) (citing *Bd. of Trs. of Univ. of Ala. v. Garrett,* 531 U.S. 356 (2001)). Federal courts lack jurisdiction to hear claims that are barred by the Eleventh Amendment because the Eleventh Amendment represents a constitutional limitation on judicial power founded in Article III of the Constitution. *Id.*

The Georgia Constitution provides:

> Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies maybe subject to

> suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived. Ga. Const., Art. I, Sec. II, Par. IX(d).

The GTCA was enacted in1992 and codified at OCGA § 50-21-20, *et seq.* The GTCA is the exclusive remedy for any tort committed by a state officer or employee. *Minor v. Barwick,* 264 Ga.App. 327, 337 (2003). O.C.G.A. § 50-21-25 provides:

> A state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor. However, nothing in this article shall be construed to give a state officer or employee immunity from suit and liability if it is proved that the officer's or employee's conduct was not within the scope of his or her official duties or employment. O.C.G.A. § 50-21-25(a).

The GTCA applies where tort claims have been brought against state officers in their official or individual capacities. Additionally, the immunity provided by the GTCA applies even if the officer acted with malice and intent to injure. *Minor,* 264 Ga.App. at 337 (citing *Ridley v. Johns,* 274 Ga. 241, 242 (2001)).

Defendants argue generally that the statutes cited in Plaintiff's jurisdictional statement do not confer jurisdiction. More persuasively, Defendants argue that the Court lacks subject matter jurisdiction to hear Plaintiff's claims brought against them in their official capacities because the Eleventh Amendment bars such claims. Furthermore, Defendants contend that the Court does not have subject matter jurisdiction to hear Plaintiff's State law claims, even if brought against Defendants personally, because the Court cannot exercise pendent jurisdiction where all federal claims have been dismissed and, alternatively, the Georgia Tort Claims Act (hereinafter, "GTCA") precludes suits, under Georgia tort law, against state officials in either their individual or official capacities.

Plaintiff, as noted above, has waived/withdrawn any claims against Defendants in their official capacities. Plaintiff then argues that the Eleventh Amendment does not bar suits against government officials in their individual capacity. Finally, Plaintiff argues that the GTCA does not bar his state law claims against Defendants because Defendants were acting outside the scope of their employment or official duties, or, alternatively, the GTCA is unconstitutional, as it runs afoul of the Fourteenth Amendment Due Process Clause.

First, Plaintiff Correctly notes that the Eleventh Amendment does not bar suits against government officials in their individual capacities. *Jackson v. Georgia Dep't of Transp.*, 16 F.3d 1573, 1575 (11th Cir.1994). Furthermore, since Plaintiff has already waived/withdrawn all of his claims brought against Defendants in their official capacities, the majority of Defendants' arguments in Part III.A. of their brief are no longer relevant. Finally, the Court having ruled in Defendants' favor on the issue of absolute immunity, *see infra* Part I.D., finds it improper to maintain pendant jurisdiction over Plaintiff's State law claims. *See infra* Part I.E.

C. Claims Against Defendant John Doe

Defendants challenge Plaintiff's claims against Defendant John Doe on the grounds of insufficient service of process and passage of the relevant statute of limitations.

As noted above, Plaintiff has waived/withdrawn all claims against Defendant John Doe. (Doc. 52). Accordingly, Defendants' Motion for Judgment on the Pleadings (Doc. 30) is **GRANTED** as it relates to all of Plaintiff's claims against Defendant John Doe, and the Clerk of Court is hereby **ORDERED** to terminate Defendant John Doe as a party to this action. Furthermore, the Clerk of Court is hereby **ORDERED** to terminate Defendant Wetherington as a defendant from this action, as Plaintiff has also waived/withdrawn all claims against him.

D. Doctrine of Absolute Immunity

Prosecutors are immune from suit for damages under Section 1983 for "initiating a prosecution and in presenting the State's case." *Imbler v. Pachtman,* 424 U.S. 409, 431 (1976). A prosecutor's duties "in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom[, including post-conviction activity concerning sentencing of the defendant], and are nonetheless entitled to absolute immunity." *See Buckley v. Fitzsimmons,* 509 U.S. 259, 273-74 (1993) (citing *Imbler,* 424 U.S. at 431); *Henzel v. Gerstein,* 608 F.2d 654, 657 (11th Cir. 1979) (holding that prosecutors were shielded by doctrine of prosecutorial immunity even where the plaintiff alleged "filing an information without investigation, filing charges without jurisdiction, filing a baseless detainer, offering perjured testimony, suppressing exculpatory evidence, refusing to investigate Henzel's complaints about the prison system, threatening Henzel with further criminal prosecutions, and attempting to persuade Henzel not to sue state officials in return for parole"). The question the Court must answer to determine whether the doctrine of absolute immunity will shield Defendants' alleged activities is whether Defendants' actions fufilled "prosecutorial functions" and/or were "intimately associated with the judicial phase of the criminal process." *See, e.g., Bums v. Reed,* 500 U.S. 478, 486 (citing *Imbler,* 424 U.S. at 430-31); *Long v. Satz,* 181 F.3d 1275, 1279 (11th Cir. 1999).

Defendants note that they do not contest Plaintiff's version of the facts concerning the actions of Defendant Hodges, merely the import of the same. As Defendants see it, Defendant Hodges was acting within the prosecutorial function by attempting to ensure the sentence as imposed by the Court was enforced. Further, even if Defendant Hodges's actions were wrongful or done with malice, such characterizations would not prohibit application of the doctrine of prosecutorial immunity. Additionally, Defendants argue that Defendants Amideo and Head also "played a role in effectuating the second detainer and thus accomplishing Plaintiff's State incarceration." Defendants also contend that the doctrine of prosecutorial immunity stretches to cover other non-lawyer officials who work within the judicial system to aide the prosecutorial function.

Plaintiff contends that Defendant Hodges was not acting within the prosecutorial function because his actions were directly at odds with a standing Superior Court order. Plaintiff's argument is that the Rule of Law requires obedience by all persons of court orders. Concerning Defendants Amideo and Head, Plaintiff notes that the instances in which courts have extended the doctrine of prosecutorial immunity to non-prosecutors involved officials acting at the behest of the court. Here, Plaintiff notes, that

Defendants Amideo and Head's actions were actually in contradiction to a court order and not consistent with, or guided by, any mandate from a court.

Plaintiff's Complaint alleges a serious misuse of prosecutorial power. However, the purpose of prosecutorial immunity is, *inter alia,* to ensure "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Burns,* 500 U.S. at 485. In light of this policy consideration, courts have permitted various egregious conduct to occur behind the shield of prosecutorial immunity. *See Bevan v. Durling,* 243 Fed.Appx. 458, 463 (11th 2007) (applying prosecutorial immunity doctrine where plaintiff alleged malicious prosecution); *Porter v. White,* 483 F.3d 1294, 1305 (11th Cir. 2007) (applying prosecutorial immunity where plaintiff alleged nondisclosure of *Brady* material); *Jones v. Cannon,* 174 F.3d 1271, 1289 n. 13 (11thCir. 1999) (applying prosecutorial immunity where plaintiff alleged procurement of false testimony at trial); *Allen v. Thompson,* 815 F.2d 1433, 1434 (11th Cir. 1987) (applying prosecutorial immunity where plaintiff alleged maliciously written letter to Bureau of Prisons and Parole Commission falsely alleging that plaintiff was guilty of additional drug trafficking, which he had not been charged for or convicted); *Henzel,* 608 F.2d at 657 (*see* parenthetical *supra* Part I.D.). Therefore, no matter how heinous Plaintiff's allegations maybe, the Court must afford Defendant Hodges the protection of prosecutorial immunity if it finds that his actions were "intimately associated with the judicial phase" of Plaintiff's criminal case. Unfortunately for Plaintiff, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[2] *Imbler,* 424 U.S. at 428.

The Court finds that Defendants Hodges, Amideo and Head acted to fulfill the prosecutorial function such that their actions were intimately related to the judicial phase of Plaintiff's criminal case. Defendant Hodges attempted to achieve completion of the sentence he thought was ordered by the federal and state court judges in Plaintiff's criminal case. Additionally Defendants Amideo and Head's actions were in concert with Hodges to attain this goal. The fact that Hodges's involvement in Plaintiff's case proceeded beyond Plaintiff's conviction does not preclude the application of prosecutorial immunity, as a prosecutor's efforts involving a convicted defendant's sentence have been recognized as appropriate prosecutorial actions. *See Henzel,* 608 F.2d at 657. Furthermore, it would be inconsistent to grant Defendant Hodges immunity for his actions and not extend such immunity to Defendants Amideo and Head, who acted pursuant to Defendant Hodges's dictates arising from his prosecutorial role. This result is permitted under *Spaulding v. Nielson,* 599 F.2d 728,

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[2] Courts have also noted "there are other checks on prosecutorial misconduct, including criminal law and professional discipline." *Burns,* 500 U.S. at 486.

729 (5th Cir. 1979)[3], where the former Fifth Circuit extended application of the doctrine of absolute immunity to a parole officer because the officer's "narrow function[, of preparing and submitting a presentence report, was] intimately associated with the judicial phase of the criminal process."

Based on all of the above, Defendants' Motion for Judgment on the Pleadings (Doc. 30) is **GRANTED** as it relates to Plaintiff's federal claims alleged in Counts I through VII.

E. Georgia Tort Claims

Since the Court has dismissed all of Plaintiff's federal claims (Counts I-VII), it is no longer appropriate for the Court to exercise pendent jurisdiction over Plaintiff's two state law claims for battery and conspiracy to commit the same (Counts VIII and IX). *See Roper v. Edwards,* 815 F.2d 1474, 1477-78 (11th Cir.1987). Accordingly, Defendants' Motion for Judgment on the Pleadings (Doc. 30) is **GRANTED** as it relates to Plaintiff's state law claims (Counts VIII and IX). The Court has not reached a decision on the merits of Plaintiff's state law claims against Defendants, therefore dismissal of Plaintiff's state law claims is **without prejudice.**

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[3] Decisions of the Fifth Circuit rendered on or before September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

II. PLAINTIFF'S MOTION FOR LEAVE TO AMEND (Doc. 46)

Plaintiff moves the Court for leave to amend his Second Amended Complaint (Doc. 15). (Doc. 46). Plaintiff seeks to incorporate the waivers/withdrawals noted by the Court above; correct the factual allegations of his Complaint to comport with the averments contained in Defendants' Answer; and amend the counts of the Complaint related to deprivation of Plaintiff's rights to life, liberty, and property to specifically identify those rights as being protected by the Fourteenth as well as Fifth Amendments. Plaintiff noted the waivers/withdrawals on the record (Doc. 52) and the Court has herein granted Defendants' Motion for Judgment on the Pleadings pursuant to application of the doctrine of absolute immunity[4], *see supra* Part I.D.; therefore, Plaintiff's Motion for Leave to Amend (Doc. 46) is **DENIED as MOOT.**

CLOSING

Accordingly, Defendants' Motion for Judgment on the pleadings (Doc. 30) is **GRANTED** and Plaintiff's Motion for Leave to Amend (Doc. 46) is **DENIED as MOOT.**

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[4] The Court notes here that Plaintiff's requested amendments would not have affected the Court's consideration of the absolute immunity issue or otherwise affect the ruling on Defendants' Motion for Judgment on the Pleadings. *See* (Doc. 46).

SO ORDERED, this 30th day of March, 2009.

/s/ W. Louis Sands
THE HONORABLE W. LOUIS SANDS,
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-12257-HH

WOODSON R. HART,

Plaintiff-Appellants.

versus

KENNETH B. HODGES, III,
in his individual capacity,
WILLIAM AMIDEO, in his
individual capacity, and
FREDERICK HEAD, in his
individual capacity,

Defendants-Appellees.

……

On Appeal from the United States District Court
for the Middle District of Georgia

……

(Filed Jan. 8, 2010)

Before: HULL, WILSON and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ FRANK M. HULL
UNITED STATES
CIRCUIT JUDGE

In the Superior Court of Dougherty County State of Georgia

State of Georgia **v.** **Woodson R. Hart**	**Case No. 00-R-1096** **Filed: Feb. 24, 2003**

ORDER

The above matter having come before this Court on Thursday, February 6, 2003, and after evidence was presented and a review by the court of the court transcript from the Plea and Sentencing Hearing, the Court finds that the sentence it imposed on March 1, 2001 was for Woodson R. Hart to serve no additional time in a state facility once he is released from the federal correctional institute.

In accordance with this finding, the Court issues the following order to enforce the sentence as originally imposed:

IT IS ORDERED that the detainer that was placed against Woodson R. Hart by the State of Georgia be removed.

IT IS FURTHER ORDERED that Woodson R. Hart will serve no additional time in any state correctional facility once he is released March 14, 2003 from the federal facility where he is currently serving.

Ordered this 20th day of February, 2003.

/s/ John D. Crosby
Judge John D. Crosby
Judge of the Superior Court
Senior Judge presiding by
appointment in Dougherty
County, Georgia

This document prepared by:

/s/ Joseph Vaknin
Joseph Vaknin
919 West First Ave.
Albany, GA 31701
(229) 438-7629
Bar No. 723166

GEORGIA DEPARTMENT OF CORRECTIONS
COMMISSIONER'S OFFICE
SUITE 866, EAST TOWER
2 MARTIN LUTHER KING, JR., DRIVE, S.E.
ATLANTA, GEORGIA 30334-4900
404/656-6002
FAX 404/651-6818

[SEAL]
Sonny Perdue
Governor

March 14, 2003

Mr. Woodson Hart
EF-469586
FBI # 934921NB3

Dear Mr. Hart:

Pursuant to the commitment received from Dougherty County in March of 2001, you are hereby instructed to surrender your person to the custody of the Georgia Department of Corrections to serve out the remainder of your sentence which expires on June 30, 2003. You should surrender no later than 8:00 AM, on Monday, March 17, 2003 at the Georgia Diagnostic and Classification Prison in Jackson, Georgia.

Failure to surrender at the above appointed place and time may result in the violation of any existing conditions of probation which you have and/or the commission of a new offense of escape from custody.

Sincerely,

/s/ William F. Amideo
William F. Amideo
General Counsel

WFA:sda

GEORGIA DEPARTMENT OF CORRECTIONS

2 Martin Luther King Jr. Drive, S. E.
Floyd Building, Twin Towers East, 7th Floor
ATLANTA, GEORGIA 30334

STATE WARRANT

To FEDERAL CORRECTIONAL INST and to any Police Officer, Sheriff, Warden or Keeper in the State of ARKANSAS.

Whereas, HART, WOODSON Serial No. EF-469586 FBI No. 934921NB3 D.O.B. [Date Of Birth Omitted] Race White Sex M who was convicted in the Superior Courts of Georgia and was sentenced by the presiding judge to a maximum release date of 06/30/2003. The major offense is BRIBERY GOVT OFFICER.

Therefore, the undersigned, by virtue of the authority conferred upon him by State Department of Corrections, does hereby authorize and direct you to retake said prisoner wherever he may be found for his return to the State Penitentiary of Georgia.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Department of Corrections. This the 12th day of March, 2003

DEPARTMENT OF CORRECTIONS

/s/ Jim Wetherington
Commissioner

Court of Appeals of the State of Georgia

ATLANTA,

The Court of Appeals hereby passes the following order:

Motion Docket No. 344. The State v. Hart.

(Filed Mar. 17, 2003)

Woodson R. Hart had been serving time in a federal correction facility in Arkansas, and it appears that, during this time, a detainer was mistakenly placed against Mr. Hart in connection with a sentence imposed against him in Georgia on March, 1, 2001. On February 6, 2003, the Superior Court of Dougherty County, after reviewing the transcript from Hart's Plea and Sentencing Hearing on his crime in Georgia, clarified Hart's sentence, to reflect the sentence it actually intended to impose on March 1, 2001. In order to comply with the clarified sentence, the trial court ordered that (1) the detainer placed against Hart be removed and (2) Hart serve no additional time in a Georgia correctional facility after he was released from the Arkansas correctional facility on March 14, 2003.

On March 12, 2003, the District Attorney of Dougherty County filed a notice of appeal with this Court, taking issue with the trial court's correction and clarification of Hart's sentence. At the same time, the District Attorney, in spite of and in direct opposition to the trial court's clarification order, requested that the Georgia Department of Corrections reinstate the detainer against Hart, requiring him to report to

Jackson State Prison on March 17, 2003. The District Attorney also indicated that, if Hart failed to show up, a fugitive warrant would be taken out against him.

In response to the District Attorney's action, on March 15, 2003, the trial court considered and granted a motion by Hart for supersedeas bond. In its order, the trial court explicitly ruled, in pertinent part:

> 4. If Bond is not granted [Hart] faces the prospect of serving three and a half months in prison contrary to the Order of this Court directing that he serve no additional time in a Georgia State Prison once released from the Federal Prison System.
>
> 5. If Bond is not granted [Hart] faces the prospect of serving much if not all of the three and a half months the State is seeking before the Court of Appeals will make a decision in this case. The undersigned originally sentenced [Hart], and it was my intent that [Hart] not serve any additional state prison time after release from federal prison.

Given the trial court's order clarifying his original intent in sentencing Hart and its order granting supersedeas bond, the District Attorney is not free to disregard the orders of the Dougherty Superior Court or to seek detainer against Hart, force Hart to serve additional time in a Georgia prison, prior to the overruling or vacation of the trial court's order, or to seek a fugitive warrant against Hart for failing to serve such time.

The District Attorney contends that, by filing a notice of appeal, the trial court's original order clarifying Hart's sentence was immediately rendered null and void. This contention is patently erroneous. OCGA § 5-6-45(a) provides: "In all criminal cases, the notice of appeal filed as provided in Code Sections 5-6-37 and 5-6-38 shall serve as supesedeas in all cases where a sentence of death has been imposed or where the defendant is admitted to bail." Neither is the case here.

Nonetheless, in defiance of the trial court's order, the District Attorney has sought to ensure that Hart serves three-and-one-half months of additional incarceration by fashioning his own remedies, as it would take the appellate court that long to rule on his appeal. However, pursuant to the trial court's order issued an February 6, 2003, Hart has already served his time in jail. An order of a Superior Court is presumed to be valid and enforceable until it is overruled or vacated by an appellate court or an authorized trial court. The District Attorney simply has no authority to subjugate an order of the Superior Court to his own will, thereby circumventing the orderly imposition of justice.

Moreover, at this time, the trial court has issued a valid order granting supersedeas bond which the District Attorney is not free to ignore. The trial court has been given the statutory authority to grant supersedeas bonds, and this authority must be respected. See OCGA § 5-6-45; OCGA § 17-6-1.

Accordingly, the District Attorney must comply with the trial court's orders in this case. He has presented this Court with no evidence of record or legal authority which would allow him to circumvent these rulings. Given the fact that Hart has completely served his time under the existing order of the trial court, the State has no lawful authority to incarcerate him at this time. As such, the District Attorney may not seek to impose a detainer against Hart or subject him to further imprisonment for the crimes underlying this matter, and any attempt to do so is at his own risk.

In accordance with this order, Hart shall be released from the custody of Jackson State Prison instanter. Hart, Hart's counsel, the District Attorney, and the Warden of Jackson State Prison shall be notified of this decision immediately, and copies of this order will also immediately be conveyed to these parties.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

[Dated: March 17, 2003]

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Will L. Martin, Clerk

FIRST DIVISION
ANDREWS, P. J.,
BARNES AND ADAMS, JJ.

NOTICE: Motions for reconsideration must be *physically* received in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, December 14, 2000) http://www.appeals.courts.state.ga.us/rules.html

August 28, 2003

In the Court of Appeals of Georgia

A03A1519. THE STATE v. HART

ANDREWS, Presiding Judge.

The State of Georgia appeals from a superior court order granting Woodson Hart's motion for the court: (1) to conform the original sentence imposed on him at a prior term of court to reflect the sentence intended by the court, and (2) to remove the State's detainer lodged against him based on the original sentence. Although we find the court had inherent power to correct errors in the recording of the sentence to conform it to the court's intention at the time sentence was imposed, we conclude the sentence the court intended to impose was indeterminate and void. Accordingly, we vacate the conformed sentence and remand the case to the superior court for re-sentencing. Because the detainer was based on the sentence, we affirm the removal of the detainer.

Pursuant to a negotiated guilty plea, Hart was sentenced on March 1, 2001 in the Dougherty Superior Court on offenses of violation of oath of office (two counts), bribery, and perjury. The written sentence entered by the court showed Hart was sentenced to a period of 27 months in prison followed by a period of 93 months on probation, and that the period of imprisonment was to be served concurrent with a term of imprisonment Hart had already been sentenced to serve in federal prison. The record shows that Hart's federal prison term was also for 27 months, but that Hart was tentatively scheduled to obtain early release from federal prison in March 2003 after serving about 24 months of the 27 month federal sentence. In June of 2001, the State lodged a detainer against Hart with the Federal Bureau of Prisons requesting that Hart be transferred into the custody of the State upon any early release from federal prison. Pursuant to the detainer, the State intended to take custody of Hart if he was released from federal prison prior to serving his entire 27 month federal sentence and incarcerate him in state prison for the remainder of the 27 month period to complete his state prison term.

In January 2003, Hart filed a motion in Dougherty Superior Court contending that the superior court judge who sentenced him in March 2001 intended that his state term of imprisonment be concurrent with his federal confinement and that, upon release from federal prison, he serve no additional time in state prison. Accordingly, Hart moved for the sentencing judge to conform the sentence to that intention and order that the detainer be removed.

The sentencing judge conducted a hearing on the motion during which he examined the transcript of the sentencing hearing. The transcript showed that, prior to sentence being imposed pursuant to the plea agreement, Hart's defense counsel pointed out that the agreement for Hart's 27 month state prison term to run concurrent to his 27 month federal prison term included the understanding that Hart would serve no more time in state prison than he served in federal prison. The transcript shows agreement with this understanding by the sentencing judge and the prosecutor, although there was no specific discussion of the possibility that Hart could obtain early release from federal prison. Following the hearing, the sentencing judge entered an order finding that "the sentence [the court] imposed on March 1, 2001 was for [Hart] to serve no additional time in a state facility once he is released from the federal correctional institute." The court also ordered that the detainer against Hart be removed.

Except as provided by statute, a sentencing court has no power to modify a valid sentence of imprisonment after the term of court in which it was imposed has expired. *Latham v. State*, 225 Ga. App. 147, 148-150 (483 SE2d 322) (1997); OCGA § 17-10-1. However, the sentencing court's order in this case was not a modification of its prior imposed sentence; rather, the court exercised its inherent power to correct its records at any time "to show the true intent of the sentencing court at the time the original sentence was imposed." *Bryant v. Evans*, 244 Ga. 673 (261 SE2d 620) (1979); *Hopper v. Williams*, 238 Ga. 612, 613 (234 SE2d 525) (1977); *Taylor v. State*, 157 Ga. App. 212 (276 SE2d 691) (1981). Contrary to the State's contention, this inherent power to correct or conform an erroneous recording of the court's intended sentence was not altered or superceded by the enactment of the provisions of OCGA § 17-10-1(f), which state that the sentencing court has jurisdiction to "correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed" within one year of the sentencing date or within 120 days after the sentencing court receives the remittitur upon affirmance of the judgment after direct appeal, whichever is later. See *Latham*, 225 Ga. App. at 148-149. Accordingly, Hart's motion filed in the sentencing court 22 months after sentence was imposed was the proper procedure to ask the court to conform the sentence to its original intention so that the sentence was made to speak the truth. *Hopper*, 238 Ga. at 613; *Johnson v. Gooding*, 242 Ga. 793, 795 (251 SE2d 534) (1979). The sentencing court found that the written sentence imposing a term of 27 months imprisonment concurrent to the federal sentence did not conform to the true intent of the court as reflected in the sentencing transcript that Hart serve at most 27 months, but not more time than the time he was required by federal authorities to serve in federal prison.

Although the sentencing court had inherent power to conform Hart's sentence to the sentence it originally intended to impose, we find the conformed sentence – the sentence the court intended to impose in March 2001 – was for an indeterminate period of imprisonment. Under the conformed sentence, the court sentenced Hart to serve a maximum term of 27 months in prison concurrent to his federal prison sentence, but no more time than he actually served on his federal sentence. Based on this sentence, if Hart had been released by federal authorities after serving one month of his federal sentence, his concurrent term of state imprisonment would also have been completed in one month. Because the term of imprisonment imposed by the sentencing court was variable based on factors entirely within the control of federal authorities, the term was necessarily indeterminate. Under OCGA § 17-10-1(a)(1), the sentencing judge "shall prescribe a determinate sentence for a specific number of months or years" and in conformity with other statutory sentencing requirements. It follows that the indeterminate sentence imposed by the sentencing court was void and must be vacated, and that the case must be remanded to the sentencing court for re-sentencing. Because the State's detainer was based on the now vacated sentence, we affirm the portion of the order removing the detainer.

Judgment affirmed in part; vacated as to sentence, and case remanded for re-sentencing. Barnes and Adams, JJ., concur.